SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 527

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

STANLEY KLINGER, WILLIAM CANTOR AND MORRIS SANDLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.A. for the Second Circuit		
Statement under Rule 15 (b)	1	1
Record from U.S.D.C., Southern District of New York	3	
Indictment	3	2
Excerpts from transcript of testimony	15	9
Judgment and commitment	16	9
Notice of appeal for the defendants, William Cantor and Stanley Klinger	18	10
Notice of appeal for the defendant, Morris Sandler	20	11
Order of Court of Appeals granting motion for leave to proceed in forma pauperis	21	12
Stipulation and order extending time to file record (Omitted in printing)	22	12
Order of Court of Appeals re record, etc.	24	12
Stipulation and order extending time to file record (Omitted in printing)	26	12
Order amending caption	28	13
Stipulations as to record	30	14
Clerk's certificate (Omitted in printing)	33	15
Opinion, Hand, J.	34	16
Judgment	42	21
Order removing original record, etc.	44	21
Clerk's certificate (Omitted in printing)	46	22
Order extending time to file petition for writ of certiorari	47	22
Designation of record	51	22
Order allowing certiorari		25

1 In United States Court of Appeals for the Second Circuit
C 132-150

UNITED STATES OF AMERICA, *Plaintiffs-Appellees,*

v.

MORTIMER GRIEF, et al., *Defendants-Appellants.*

Statement under Rule 15(b)

The indictment herein C 132-150 was filed against the defendants Mortimer Grief, Stanley Klinger, William M. Zwang, William Cantor, Edward Goroff, Morris Sandler and Jack Burke on the 31st day of March, 1950.

On the 5th day of April, 1950, all the aforementioned defendants pleaded not guilty and released in Two Thousand Five Hundred ($2,500.00) Dollars bail. The defendant Zwang being absent the Court entered a plea of not guilty for him.

On the 24th day of May, 1951, Judge Sugerman signed a final Order severing the trial of the defendant Zwang and staying his trial sine die.

On the 7th day of January, 1952, the case came to trial before the Hon. Edward A. Conger and a jury. The defendant Goroff changed his plea of not guilty to one of guilty. Whereupon, sentence was deferred until the expiration of the trial on the request of Assistant United States Attorney Thomas Burchill. Mr. Burchill then made a motion to sever the case against the
2 defendant Burke, which motion was granted.

The trial was conducted against the defendants Grief, Klinger, Cantor and Sandler. From the 8th day of January, 1952 until and including the 5th day of February, 1952 when the jury returned a verdict of guilty as against the defendants Klinger, Cantor and Sandler and a verdict of not guilty as against the defendant Grief.

Defendants Klinger, Cantor and Sandler were sentenced on the 4th day of March, 1952 each to a term of two years. Bail was continued as to all defendants pending application to Judge Conger within one week.

A Notice of Appeal was served and filed by the defendants Klinger and Cantor on the 13th day of March, 1952 and by the defendant Sandler on the 14th day of March, 1952.

On the 7th day of April, 1952, the defendants Klinger and Cantor made a motion before the Court of Appeals for the Sec-

ond Circuit to have the appeal heard in forma pauperis, which motion was granted by the Court.

No question was referred to a Commissioner, Master or Referee.

3 In United States District Court

Southern District of New York

UNITED STATES OF AMERICA,

v.

MORTIMER GRIEF, STANLEY KLINGER, WILLIAM M. ZWANG, WILLIAM CANTOR, EDWARD GOROFF, MORRIS SANDLER and JACK BURKE, *Defendants.*

Indictment

The Grand Jury charges:

1. Beginning on or about January 1, 1946, and continuously thereafter, up to and including the date of filing of this indictment, at the Southern District of New York, MORTIMER GRIEF, STANLEY KLINGER, WILLIAM M. ZWANG, WILLIAM CANTOR, EDWARD GOROFF, MORRIS SANDLER and JACK BURKE, the defendants herein, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other and with Sidney Morgenbesser, Irving Schwartz, Max Targove, Irving Targove, Allen Shapiro, Isadore Shapiro, Harry Koenig, Martin Gilbert and William Braunstein, named as co-conspirators but not indicted herein, and with divers other persons to the Grand Jurors unknown, to defraud the United States of America in the exercise of its governmental function of controlling and rationing the purchase, sale and use of sugar free from unlawful impairment, obstruction, dishonesty, corruption and fraud, and to defraud the United States of America of and concerning its governmental function to have the lawful functions of the Office of Price Administration of the United States exercised and administered free from unlawful impairment and obstruction, corruption, improper influence bias, dishonesty, hope of unlawful reward, and fraud, and of and concerning its right to and interest in the conscientious, honest and faithful services, judgments, determinations and actions of the defendants, MORTIMER GRIEF, STANLEY KLINGER, WILLIAM M. ZWANG and WILLIAM CANTOR, as duly appointed employees of the Office of Price Administration, free from corruption, improper influence, dishonesty, bias, hope of unlawful reward and fraud.

4

2. That as said defendants and co-conspirators well knew, from the beginning of this conspiracy and continuously up to and including October 18, 1946, the defendant MORTIMER GRIEF, was an Enforcement Attorney in the Food Section of the Enforcement Division of the Office of Price Administration at New York, New York.

3. That as said defendants and co-conspirators well knew, from the beginning of this conspiracy and continuously up to and including September 20, 1946, the defendant STANLEY KLINGER, was an Investigator in the Food Section of the Enforcement Division of the Office of Price Administration at New York, New York.

4. That as said defendants and co-conspirators well knew, from the beginning of this conspiracy and continuously up to and including October 4, 1946, the defendant William M. Zwang, was an Investigator in the Food Section of the Enforcement
5 Division of the Office of Price Administration at New York, New York.

5. That as said defendants and co-conspirators well knew, from the beginning of this conspiracy and continuously up to and including September 20, 1946, the defendant WILLIAM CANTOR, was an Investigator in the Food Section of the Enforcement Division of the Office of Price Administration at New York, New York.

6. That as said defendants and co-conspirators well knew, during this conspiracy the co-conspirators, Irving Schwartz and Sidney Morgenbesser, were engaged in the wholesale Food business at 391 East 149th Street, Bronx County, State of New York, and at 3476 Bailey Avenue, Bronx County, State of New York, under the name of Boro Food Company, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 155th Street and Third Avenue, Bronx County, New York.

7. That as the said defendants well knew, during this conspiracy the co-conspirator Allen Shapiro, was engaged in the operation of a retail food store at 1182 Second Avenue, under the name of A & G Grocery, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 37 Avenue B, New York, New York.

6 8. That as the said defendants well knew, during this conspiracy the co-conspirator Isadore Shapiro was engaged in the operation of a retail food store at 1042 Third Avenue, un-

der the name of Service Dairies, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Corn Exchange Bank Trust Company located at 770 Lexington Avenue, New York, New York.

9. That as the said defendants well knew, during this conspiracy the co-conspirators Max Targove and Irving Targove were engaged in the operation of a retail food store at 731 Lexington Avenue, under the name of Lexington Fruit Shop, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 711 Lexington Avenue, New York, New York.

10. That as the said defendants well knew, during this conspiracy the co-conspirator Harry Koenig, was engaged in the operation of a retail food store at 4601 Edgemere Avenue, Queens County, State of New York, under the name of Nel-Ben Dairy, Inc., and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Corn Exchange Bank Trust Company located at 1912 Mott Avenue, Far Rockaway, Queens County, New York.

7 11. That as the said defendants well knew, during this conspiracy the co-conspirator Martin Gilbert, was engaged in the operation of a retail food store at 1547 President Street, Kings County, New York, under the name of President Grocery and Dairy Company, and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 257 Utica Avenue, Brooklyn, New York.

12. That as the said defendants well knew, during this conspiracy the co-conspirator William Braunstein, was engaged in the operation of a retail food store at 2523 Avenue U, Brooklyn, New York, under the name of Braustein Bros., and had been issued an allowable sugar inventory by the Office of Price Administration, and maintained a sugar ration bank account at a branch of the Manufacturers Trust Company located at 257 Utica Avenue, Brooklyn, New York.

13. It was a part of the conspiracy that co-conspirators Sidney Morgenbesser, Irving Schwartz, Max Targove, Irving Targove, Allen Shapiro, Isadore Shapiro, Harry Koenig, Martin Gilbert and William Braunstein, at the direction and guidance of the defendants, would issue sugar ration checks drawn on their respective

sugar ration bank accounts in amounts substantially in excess of the inventories allotted to them as aforesaid.

8 14. It was further a part of said conspiracy that the sugar ration checks issued as aforesaid would be given to sugar distributors by the defendants and by the co-conspirators at the direction of the defendants in exchange for approximately six million (6,000,000) pounds of sugar and syrup.

15. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the identity of the purchasers of the sugar and syrup aforesaid by issuing false and fictitious invoices.

16. It was further a part of the said conspiracy that large quantities of sugar and syrup would be sold by the defendants and the co-conspirators at the direction and guidance of the defendants, at prices far in excess of the maximum ceiling prices therefor.

17. It was further a part of said conspiracy at a time fixed by the defendants, MORTIMER GRIEF, STANLEY KLINGER, WILLIAM M. ZWANG and WILLIAM CANTOR, defendants herein, as employees of the Office of Price Administration would merely recommend suspension of the co-conspirators from further dealings in sugar and would not refer their cases for criminal prosecution.

18. It was further a part of the said conspiracy that the said defendants and said co-conspirators would conceal the aforesaid acts and transactions and would do such other, further and different acts as they might deem necessary and advisable to prevent the disclosure of the existence of said conspiracy, and would
9 destroy records, books and documents, and would attempt to obtain the destruction of records, books and documents which might in any way evidence the existence of said conspiracy and any transaction in furtherance thereof, and would attempt to suppress and to obtain the suppression of any and all information and evidence of the acts made and done in furtherance of said conspiracy. (Title 18, Section 88, United States Code, (1946 Edition)).

Overt Acts

10 1. In pursuance of the said conspiracy and to effect the objects thereof, in and about the month of February 1946, at the Southern District of New York, the defendant STANLEY KLINGER had a conversation with co-conspirators Irving Schwartz

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 25th day of March, 1946, at the

Southern District of New York, the defendant STANLEY KLINGER did take and receive approximately $1500 in currency from co-conspirators Irving Schwartz and Sidney Morgenbesser.

3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 26th day of March, 1946, at the Southern District of New York, the defendant STANLEY KLINGER did take and receive approximately $1250 in currency from co-conspirators Irving Schwartz and Sidney Morgenbesser.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 27th day of March, 1946, at the Southern District of New York, the defendant STANLEY KLINGER did take and receive approximately $1500 in currency from co-conspirators Irving Schwartz and Sidney Morgenbesser.

5. In further pursuance of the said conspiracy and to
11 effect the objects thereof, in and about the month of April, 1946, at the Southern District of New York, co-conspirator Sidney Morgenbesser, doing business at Boro Food Company, signed a consent to an order suspending him from buying, selling, using or dealing in sugar for so long as sugar was rationed.

6. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of March, 1946, at the Southern District of New York, the defendant MORRIS SANDLER had a conversation with co-conspirators Irving Schwartz, Sidney Morgenbesser and Allen Shapiro.

7. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of May, 1946, at the Southern District of New York, the defendants STANLEY KLINGER and MORTIMER GRIEF had a conversation with co-conspirators Irving Schwartz, Sidney Morgenbesser and Allen Shapiro at 96 East 170th Street, Bronx County, New York.

8. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of May, 1946, at the Southern District of New York, co-conspirators Irving Schwartz and Sidney Morgenbesser gave the defendant MORTIMER GRIEF a letter.

9. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of July, 1946, at the Southern District of New York, the defendants STANLEY KLINGER and WILLIAM CANTOR had a conversation with co-conspira-
12 tors Irving Schwartz and Sidney Morgenbesser at 56 Featherbed Lane, Bronx County, New York.

10. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of May, 1946, at the Southern District of New York, the defendant WILLIAM CANTOR had a conversation with co-conspirators Irving Schwartz, Sidney Morgenbesser and Allen Shapiro, at 1182 Second Avenue, New York, New York.

11. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of August, 1946, at the Southern District of New York, the defendants WILLIAM CANTOR and STANLEY KLINGER had a conversation with co-conspirators Max Targove and Irving Targove at 731 Lexington Avenue, New York, New York.

12. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 19th day of August, 1946, at the Southern District of New York, the defendant WILLIAM CANTOR gave co-conspirator Max Targove approximately $1000 in currency.

13. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of September, 1946, at the Southern District of New York, the defendant WILLIAM CANTOR gave co-conspirator Max Targove approximately $1000 in currency.

14. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 28th day of August, 1946,
13 at the Southern District of New York, the defendant EDWARD GOROFF did take and receive from co-conpirator Max Targove a check drawn on the Manufacturers Trust Company, payable to the order of Quaker Sugar Co. in the amount of $2,193.75.

15. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 26th day of August, 1946, at the Southern District of New York, the defendant EDWARD GOROFF did take and receive from co-conspirator Max Targove a check drawn on the Manufacturers Trust Company, payable to the order of Quaker Sugar Co. in the amount of $4,387.50.

16. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of July, 1946, at the Southern District of New York, the defendant MORRIS SANDLER did take and receive from co-conspirator Allen Shapiro a check drawn on the Corn Exchange Bank Trust Company, payable to the order of Quaker Sugar Co. in the amount of $3,190.

17. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 9th day of July, 1946, at the Southern District of New York, the defendant MORRIS SANDLER did take and receive from co-conpsirator Allen Shapiro a check drawn on the Corn Exchange Bank Trust Company, payable to the order of Quaker Sugar Co. in the amount of $3,190.

18. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 9th day of July, 1946, at the Southern District of New York, the defendant MORRIS SANDLER did take and receive from co-conspirator Allen Shapiro, approximately $1000 in currency.

19. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of July, 1946, at the Southern District of New York, the defendant WILLIAM M. ZWANG had a conversation with co-conspirator Martin Gilbert at 350 Fifth Avenue, New York, New York.

20. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of October, 1946, at the Southern District of New York, the defendant JACK BURKE signed the name "Joseph Benjamin" on a power of attorney.

21. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of October, 1946, at the Southern District of New York, the defendant JACK BURKE gave the power of attorney signed as aforesaid to a representative of the Public National Bank at 169th Street, Bronx County, New York.

22. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of October, 1946, at the Southern District of New York, the defendant JACK BURKE signed the name "Joseph Benjamin" to a signature card at the Public National Bank at 169th Street, Bronx County, New York.

23. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 13th day of August, 1946, at the Southern District of New York, the defendant EDWARD GOROFF did take and receive from Floyd A. Ewald a check drawn on the Northwestern National Bank of Minneapolis, payable to the order of M. V. Armstrong, in the amount of $9,180.

24. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 13th day of August, 1946, at the Southern District of New York, the defendant EDWARD GOROFF did take and receive from Floyd A. Ewald a check drawn on the Northwestern National Bank of Minneapolis, payable to the order of M. V. Armstrong, in the amount of $8,160.

25. In further pursuance of the said conspiracy and to effect the objects thereof, in and about the month of December, 1946, at the Southern District of New York, the defendants WILLIAM M. ZWANG *and* MORTIMER GRIEF had a conversation with co-conspirator Harry Koenig at 52 William Street, New York, New York. (Title 18, Section 88, U.S.C. (1946) Edition).

15 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Excerpts from Transcript of Testimony

New York, January 29, 1952

Trial resumed.

MR. TURKUS: Let me finish. On behalf of the defendant Grief, I move to dismiss the indictment against him for the following reasons:

THE COURT: Have you got a copy of that?

MR. TURKUS: Here is a copy. I am not going to read it into the record, Judge.

Motions to dismiss

THIRD: At this time I move to dismiss the indictment on the ground that it is founded upon alleged acts and declarations which occurred more than three years prior to the time the indictment was filed in March, 1950, and was therefore barred by the applicable statute of limitations governing a conspiracy of the United States Code Annotated.

MR. BERMAN: Now in connection with dismissing the indictment, I make the same motions and applications as defendants Cantor and Klinger as has been made by both Mr. Turkus and Mr. Bender in a written memorandum handed up to the Court, in so far as they are applicable to both my clients, Cantor and Klinger, with the same force and effect as if I reiterated them and stated them at length before this Court.

THE COURT: All right.

New York, February 1, 1952

Trial Resumed.

MR. BENDER: All right. We now reiterate all our motions, your Honor, made prior to the trial, made during the trial, and made after the Government rested its case. And, of course, we move for directed verdicts of acquittal for all of the defendants on trial.

THE COURT: That is denied.

MR. BENDER: Exception.

16 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Judgment and Commitment—Filed March 4, 1952

On this 4th day of March, 1952 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense

of conspiring to defraud the United States of a governmental function in connection with the rationing of sugar and of the honest and faithful services of employees of the Office of Price Administration

Title 18, Section 88, U. S. Code (1946) Ed. as charged and the court having asked the defendant whether he has anything to say why the judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged
17 convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General of his authorized representative for imprisonment for a period of TWO (2) YEARS

Bail continued pending application to Judge Conger within one week.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDWARD A. CONGER
United States District Judge

18 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Notice of Appeal for the Defendants—William Cantor and Stanley Klinger—March 12, 1952

1. The name and address of the Appellants:

William Cantor—95 Donor Avenue, East Paterson, New Jersey; Stanley Klinger—24 Cambridge Street, Roslyn, Long Island.

2. The name and address of the attorney—Abraham Berman, 745 Fifth Avenue, New York, N. Y.

3. The offense—To defraud the United States of America in the exercise of its governmental function of controlling and rationing the purchase, sale and use of sugar free from unlawful impairment, obstruction, dishonesty, corruption and fraud, and to defraud the United States of America of and concerning its governmental function to have the lawful functions of the Office of Price Administration of the United States exercised and administered free from unlawful impairment and obstruction, corruption, improper influence, bias, dishonesty, hope of unlawful reward, and fraud, and of and concerning its right to and interest in the con-
19 scientious, honest and faithful services, judgments, determinations and actions of the defendants.

4. A statement of the judgment giving the date and sentence—Sentenced on March 4th, 1952 to a term of two years in prison.

5. The name of the institution where now confined if not on bail—None; appellants being out on bail.

I, Abraham Berman, Esq., as attorney for the above-named Appellants, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

New York,

ABRAHAM BERMAN
Attorney for Defendants-Appellants
Office & P. O. Address
745 Fifth Avenue
Borough of Manhattan
City of New York

20 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Notice of Appeal for the Defendant, Morris Sandler—March 14, 1952

Morris Sandler—351 F.D. Roosevelt Drive, New York City, New York—Appellant.

Louis Bender—41 Park Row, New York City, New York—Appellant's attorney.

Offense: A single count of conspiracy with others to defraud the United States in the operation of its sugar ration program and corrupting and impairing certain O.P.A. officials under Title 18, Section 88 U.S.C.A.

Judgment of conviction after a verdict of guilt by the jury entered on March 4th, 1952 and sentenced thereon on the same date to two years imprisonment.

Now on bail.

By his attorney Louis Bender, the above-named Appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the above-stated Judgment.

Dated—March 14, 1952.

LOUIS BENDER
Attorney for the defendant Morris Sandler
Office & P. O. Address
41 Park Row
New York City
New York

21 IN UNITED STATES COURT OF APPEALS

* * * * * * * * * *

PRESENT:

HON. HARRIE B. CHASE,
HON. JOHN BIGGS, JR.,
HON. CHARLES E. CLARK,
Circuit Judges.

[Title Omitted]

Order Granting Motion for Leave to Proceed In Forma Pauperis—April 7, 1952

A motion having been made herein by counsel for Appellants for leave to proceed in forma pauperis,

Upon Consideration thereof, it is

ORDERED that said motion be and it hereby is granted.

s/ ALEXANDER M. BELL
Clerk

22 Stipulation and order extending time to file record

(omitted in printing)

* * * * * * * * * * *

24 IN UNITED STATES COURT OF APPEALS

* * * * * * * * * * *

[Title Omitted]

Order Re Record, Etc.

A motion having been made herein by counsel for appellants William Cantor and Stanley Klinger to direct that the United States bear the expense of furnishing typewritten copies of the minutes of the trial and for an extension of time,

Upon consideration thereof, it is

Ordered that the appellants may proceed on the original
25 papers from the files of the United States District Court for the Southern District of New York and that the time to file the typewritten brief for appellants William Cantor and Stanley Klinger be and it hereby is extended to May 22, 1952.

Further ordered that argument of the appeal be and it hereby is set for June.

Further ordered that the motion be and it hereby is otherwise denied.

ALEXANDER M. BELL
Clerk

A true copy,
ALEXANDER M. BELL
Clerk

26 Stipulation and order extending time to file record (omitted in printing)

* * * * * * * * * * *

28 IN UNITED STATES DISTRICT COURT

* * * * * * * * * * *

C 132/150

UNITED STATES OF AMERICA, *Plaintiff*,

-against-

MORTIMER GREIF, STANLEY KLINGER, WILLIAM CANTOR, WILLIAM M. ZWANG, EDWARD GOROFF, JACK BURKE and MORRIS SANDLER, *Defendants*.

Order Amending Caption

MORTIMER E. GREIF having moved this Court for an order amending the caption herein, so as to drop the name of MORTIMER GREIF therefrom, from any and all future proceedings in regard to this matter and said motion having duly come on to be heard on the 12th day of May, 1952, and MORTON ZUCKERMAN, Esq., having appeared in favor of said motion and MYLES J. LANE, Esq., United States Attorney for the Southern District of New York, by THOMAS F. BURCHILL, JR., Esq., of Counsel, having appeared and having no opposition thereto, and due deliberation having been had thereon.

Now, on reading and filing the notice of motion dated April 9, 1952 and the affidavit of MORTIMER E. GREIF, duly verified the 29th day of April, 1952, having been submitted in support of said motion and no papers having been submitted in opposition, it is on motion of MORTON ZUCKERMAN, Esq., attorney for the moving party

29

ORDERED that the motion be and the same is hereby granted and it is further

ORDERED that the caption is hereby amended to appear as follows in all future proceedings had herein:

UNITED STATES OF AMERICA, *Plaintiff*,

-against-

STANLEY KLINGER, WILLIAM CANTOR, WILLIAM M. ZWANG, EDWARD GOROFF, JACK BURKE and MORRIS SANDLER, *Defendants.*

ENTER

GREGORY E. NOONAN
U.S.D.J.

30 IN UNITED STATES DISTRICT COURT

[Title Omitted]

Stipulation as to Record—May 16, 1952

IT IS HEREBY STIPULATED AND AGREED, that the foregoing as well as the original typewritten minutes of the trial transcribed by the Southern District Court Reports from Page 1 to 2404 inclusive is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.
Dated—New York, May 16, 1952.

MYLES J. LANE
Attorney for United States of America

LOUIS BENDER
Attorney for the defendant-appellant Morris Sandler

BERMAN & BERMAN
Attorneys for defendants-appellants William Cantor and Stanley Klinger

* * * * * * * * * * * *

Stipulation as to Record—May 21, 1952

31 The appellants herein and their counsel have represented and hereby represent to the appellee:

(1) That this transcript of the record contains all matter necessary fairly to present their points and such points as are relevant in reply.

(2) That in so far as the transcript of record purports to contain the stenographic minutes of proceedings, the minutes are set forth accurately, and omissions, if any, are clearly marked. Such omissions are only of matter wholly immaterial to any question raised on this appeal.

(3) That none of the exhibits are reprinted.

(4) That the transcript of the record contains all matters required to be set forth by applicable rules.

In reliance upon these representations, it is hereby stipulated and agreed by the undersigned that the foregoing is a true copy of the transcript of record of the District Court for the Southern District of New York in the above entitled matter as agreed
32 on by the parties, and further, that all the exhibits pertaining to this cause not reproduced herein, may be submitted to the Court upon the argument of the appeal, with the same force and effect as if reproduced herein and, further, if it should appear to the appellee that matter properly a part of the transcript of record has been omitted and has become material, despite the representations herein made, the appellee may, at its option, reprint such matter as an appendix to its brief or may require the appellants to reprint such matter, and use such matter with the same force and effect as if reproduced herein.

Dated—New York, May 21st, 1952.

MYLES J. LANE
United States Attorney

LOUIS BENDER
Attorney for Appellant Morris Sandler

BERMAN & BERMAN
Attorney for Appellants William Cantor and Stanley Klinger

33 Clerk's Certificate to foregoing transcript omitted in printing.

• • • • • • • • • • •

34 IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES, *Appellee,*

v.

STANLEY KLINGER, WILLIAM CANTOR and MORRIS SANDLER, *Appellants.*

Opinion—Nov. 3, 1952

Before:

SWAN, *Chief Judge,*
L. HAND and FRANK, *Circuit Judges.*

Appeals from a judgment of conviction of the District Court for the Southern District of New York—Conger, *J.*—upon an indictment for a conspiracy to violate Section 371 (formerly 88) of Title 18 of the United States Code by defrauding the United States of the services of its employees in control of sugar rationing.

FREDERICK S. BERMAN, *for Cantor and Klinger.*
LOUIS BENDER, *for Sandler.*
ROBERT MARTIN, *for the appellee.*

---

35 L. HAND, *Circuit Judge:*

The only point which we find it necessary to decide upon these appeals is whether the prosecution was barred by the Statute of Limitation. The convictions were under an indictment found on March 31, 1950, which charged the defendants with conspiracy to "defraud the United States";* that is, by "impairing, obstructing or defeating the lawful function of any department of Government,"** in this instance the rationing of sugar through the Office of Price Administration. It is not necessary to set out the evidence beyond saying that the prosecution did not prove that the conspiracy lasted beyond December 31, 1946; and that the result depends upon whether the three year period of limitation, which

---

* §371 (formerly §88) Title 18, U. S. Code.

** *Haas* v. *Henkel,* 216 U. S. 462, 479.

concededly applied to the crime,† began to run on January 1, 1947, or on January 1, 1950. The answer to that turns upon the following clause in the Act of 1944: "The running of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President." †† That act was an amendment of the first section of the Act of August 24, 1942;††† and in 1948, when the Criminal Code as a whole was amended, that Act was itself put into general terms, as follows: "When the United States is at war, the running of the Statute of Limitations is suspended" etc.;†††† and in that form it now appears as §3287 of Title 18 of the United States Code, which went into effect on September 1, 1948.††††† If §3287
36 had enlarged the period of limitation beyond the extension granted in 1944, it would govern this appeal, because the period fixed by the Act of 1944 had not expired in 1948; but the prosecution does not suggest that it did, and we shall confine our discussion to the Act of 1944.

If the words be read literally, there was no escape from holding that in computing the period of limitation of three years, one should start on January 1st 1950, and not on January 1st 1947; and it would of course follow that, for any crimes of the kind described, an indictment might be found at any time before January 1, 1953. On the other hand, if the clause was the same as though it read: "the bar of the statute is suspended until three years" etc., the period of limitation expired on December 31, 1949, and the indictment was too late. The word, "running," is a colloquial term, not a "word of art," coined *ad hoc*, and it does not appear to us that in this setting it so inexorably excludes the meaning, "bar," that it will not bear that construction, if only so will the purpose of the Act as a whole, be realized, and consequences avoided that Congress certainly would not have tolerated. We concede that in the Act of 1942,* which we quote in the margin, "running" did

† §3281, Title 18, U. S. C.

†† 58 St. at Large, p. 667.

††† 56 St. at Large, p. 747.

†††† 62 St. at Large, p. 828.

††††† 62 St. at Large, p. 862.

* The running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions were the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

not mean "bar"; but that it was used to toll the statute of limitations until July 1st, 1945, or some earlier date; and our interpretation does therefore involve the assumption that Congress used the word in a different sense in 1944. The strength, and the
37 only strength, of the prosecution's argument is that we should not make that assumption, but should accept the literal meaning of the word; and to this we should yield, were it not that, (1), the construction we adopt preserves the original purpose of the Act of 1942 to extend existing periods of limitation only by the time which should elapse before the declared termination of hostilities; and that, (2), if the Act of 1944 in addition more than doubled the existing period of limitation for crimes committed before January 1st, 1947, a situation resulted, which we cannot imagine that Congress would have countenanced.

In *United States* v. *Smith*, 342 U. S. 225, the Supreme Court by a vote of five to four decided that the Act of 1944 did not apply to crimes committed between December 31, 1946 and January 1st, 1950; that is, that as to such crimes the "bar" of the statute was not suspended, and fell at the end of three years after they were committed. Not only was this the actual decision of all five of the justices, but the joint opinion of four leaves no doubt that they construed "running" as "bar," though it is true that they did not use that locution. The nub of their opinion was as follows, p. 229: "The prosecution would have us change the function of the date of termination of hostilities. It would provide various periods of suspension for crimes committed within the three-year period commencing with the termination of hostilities. That seems to us to be an alteration in the statutory scheme, one that destroys its symmetry. Since under our construction the three-year period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformly. The time when law-enforcement officers were busy with war activities is not counted; when the pressure was off, the time began to run again. No reasons of policy are suggested for straining the language of the Act to suspend the running of the statute beyond the emergency which made the sus-
38 pension seem advisable." That can only mean that "three-year period" which "starts to run at the date of termination of hostilities" is the period prescribed for limitation; it cannot cover a preliminary term of three years before the period of limitation begins; for, if so, the prosecution would not have been barred. The minority opinion shows that this is how these four justices understood the others; for it takes issue with precisely that interpretation, saying, p. 231: "Until that time" December 31, 1949, "there was to be no statute of limitations. On that date the suspension was lifted, and the statute began to run again. The Court's

construction that the suspension was lifted at the termination of hostilities gives no effect to the three-year period." Hence the minority opinion gives no indication of how the four justices who concurred in it, would vote upon the question now at bar, assuming, as we should, that they would accept the actual decision of the Court that the Act did not apply to crimes committed between January 1st, 1947, and December 31st, 1949. Forced, as by hypothesis we are to assume that they would feel themselves to be, to hold that there *was* a statute of limitations before January 1st, 1950, at least as to some crimes; and that as to these it did not begin "to run *again*" on that day, we have no warrant for supposing that they would hold that, crimes committed before January 1st, 1947, might be prosecuted at any time before January 1st, 1953, although those committed between January 1st, 1947 and January 1st, 1950, must be prosecuted before that date. It is true that Justice Clark in his separate opinion, p. 231, did make such a distinction when he said that Congress meant to give the prosecution six years after December 31, 1946 within which to indict for crimes committed "between the date of the Act of 1942" (August 24, 1942), and December 31, 1946; but only three years after December
31, 1946, to indict for crimes committed before August 24,
39 1942,—to which could be added any part of the period of limitation which had not expired on August 24, 1942. Since, as we have shown, the four justices in the majority thought otherwise, we should not be warranted in assuming that the dissenting four would not accept their view. It seems to us therefore that we must choose between the views of the four and the argument of the prosecution, and, as *res integra*, we believe that, both from the language of the Senate Reports and the consequences that would otherwise ensue, the Act of 1944 used "running" in the sense of "bar."

The Senate Report* which accompanied the Act of 1942, declared that its "purpose" was "to suspend any existing statutes * * * applicable to * * * defrauding the U. S. * * * for the period of the war. * * * action should be taken * * * to extend the limitation statute so that frauds may be discovered and punished even after the termination of the present conflict and to insure that the limitations statute will not operate under stress of the present-day events." It was assumed that, if "the law-enforcement branch of the Government" had three years after June 30, 1945 or earlier, that would be time enough to "discover" any frauds which might have escaped detection, *bello flagrante*. The war was then only about nine months old, and by 1944 its demands upon our resources, in personnel as well as in materiél, may have become so great that,

* Senate Report No. 1544; 77th Congress 2nd Session.

although three years after the "shooting war" had ended had originally been thought enough, double that time then appeared necessary. However, if Congress had so changed its mind, the Senate Report which accompanied the bill** gave no such indication, unless it was in the words: "It is clear that the bulk of the offenses * * * will not be apprehended or investigated until the end of the war and will then require considerable time
40 before they advance to the stage of litigation." That language was certainly a most equivocal way of saying that accumulation of cases was so great that twice the time had become necessary to clear it up after "hostilities" had ended. And that aside, it would be unreasonable to impute to Congress a purpose to pass an act providing that crimes, committed before "hostilities" had ended, should have a period of limitation made up of all the time that has elapsed before that date, plus twice the period allowed for crimes committed after "hostilities" ended. All the crimes equally became a part of "the bulk of offenses cognizable under this statute" with which the "law-enforcement branch" had to deal after December 31, 1946; and there was no reason to suppose that the later crimes would be "apprehended or investigated" before the earlier. Indeed, so far as any speculation whatever is in order, it would be that the earlier offenses would be earlier discovered. Moreover, all such crimes would be equally injurious to the interests of the United States, so that we must not suppose that Congress would be more lenient as to a part of them than as to the rest. For these reasons we cannot see why, once it is settled that "running" means "bar" as to crimes committed after the "termination of hostilities," it does not mean the same thing as to crimes committed before, or to suppose that Congress meant to give the "law-enforcement branch" twice the time to detect the second that it was to have to detect the first.

We have not considered any of the other decisions upon the Act of 1944, because those decided before January 7, 1952, were superseded, when *United States* v. *Smith*, *supra*, was handed down, and so far as we know, the question has come up only once since that time—*United States* v. *Showalter*, 103 Fed. Supp. 806—although it is quite true that there the court took the contrary view to ours. We agree that the issue is not free from doubt; all
41 we can say is that the reasoning in that case does not persuade us. The issue involves the baffling question which comes up so often in the interpretation of all kinds of writings; how far is it proper to read the words out of their literal meaning in order to realize their overriding purpose? It is idle to add to the acres of paper and streams of ink that have been devoted to

** Senate Report No. 1057; 78th Congress 2nd Session.

the discussion. When we ask what Congress "intended," usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion. He who supposes that he can be certain of the result, is the least fitted for the attempt.

Judgment reversed; indictment dismissed.

42 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * * * * * * * * * *

UNITED STATES, *Plaintiff-Appellee*

v.

STANLEY KLINGER, WILLIAM CANTOR & MORRIS SANDLER,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Judgment—November 3, 1952

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed; indictment dismissed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL *Clerk*

44 IN UNITED STATES COURT OF APPEALS

[Title Omitted]

Order Removing Original Records, Etc.—Dec. 5, 1952

An application having been made herein by the Solicitor General to have the original record certified and to remove said record from the files of this Court for filing with the Clerk of the Supreme Court of the United States for use in connection with a petition for a writ of certiorari,

Upon consideration thereof, it is

Ordered that said application be and it hereby is granted.

Further ordered that the Solicitor General do whatever is necessary to effect the return of said record to this Court on completion of the case in the Supreme Court of the United States.

THOMAS W. SWANN
Chief Judge

46 Clerk's Certificate to foregoing transcript omitted in printing.

47 SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1952.

[Title Omitted]

Order Extending Time to File Petition for Writ of Certiorari—Filed November 28, 1952

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 2, 1953.

ROBERT H. JACKSON
Associate Justice of the Supreme Court of the United States.

Dated this 28 day of November, 1952.

[File Endorsement Omitted]

51 IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 527

[Title Omitted]

Designation of Record

The Clerk will please print the following portions of the record in the above-entitled cause:

1. The following portions of Volume III:

a. Line 6 through line 12, inclusive, on page 1633.
b. Line 18 through line 24, inclusive, on page 1647.
c. Line 6 through line 14, inclusive, on page 1671.

2. The following portions of Volume IV:
a. Line 14 through line 21, inclusive, on page 2055.

3. All of Volume V.

WALTER J. CUMMINGS, JR.
Walter J. Cummings, Jr.
Solicitor General
Counsel for Petitioner

January 14, 1953

☆U.S. GOVERNMENT PRINTING OFFICE 1953—239175/P.O. 1031

Supreme Court of the United States

No. 527, October Term, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY KLINGER, WILLIAM CANTOR, AND MORRIS SANDLER

Order allowing certiorari

Filed April 6, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 634, 635, and 636.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

249934—53

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	5
Conclusion	14

CITATIONS

CASES:

Danebo Lumber Co. v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489	8
Furrow v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496	8
Hanger v. *Abbott*, 73 U. S. 532	10
United States v. *Beacon Brass Co.*, 344 U. S. 43	7
United States v. *Markowitz*, 34 F. Supp. 829	9-10
United States v. *Showalter*, 103 F. Supp. 806	7
United States v. *Smith*, 342 U. S. 225	5-6
United States v. *Wiley*, 78 U. S. 508	11

STATUTES:

Act of August 24, 1942 (56 Stat. 747), Section 1	9
Contract Settlement Act of 1944 (Act of July 1, 1944, 58 Stat. 649), Section 19(b)	11
Surplus Property Act of 1944 (Act of October 3, 1944, 58 Stat. 765, 18 U.S.C. (1946 ed.) 590a, Section 28	2, 12
Suspension Act of August 24, 1942, 56 Stat. 747, Section 1, as amended by Section 28 of the Surplus Property Act of October 3, 1944, c. 479, 58 Stat. 765, 781 (18 U.S.C. 590a)	2, 12
Uniform Code of Military Justice (Act of May 5, 1950, 64 Stat. 107, 50 U.S.C. (Supp. V) 618 (f)), Article 43(f)	8, 13
18 U.S.C. (Supp. V) 3282	4
18 U.S.C. (Supp. V) 3287	3, 7, 13

MISCELLANEOUS:

Black's Law Dictionary (3d ed.) 1572	9
Bouvier's Law Dictionary, Rawle's 3rd Revision, Vol. 2	10
90 Cong. Rec. 6059-6060	11
Hearings before Subcommittee of the Committee on Armed Services on H. R. 2498, 81st Cong., 1st sess., pp. 1044-1046	13
Presidential Proclamation 2714, 12 F. R. 1, December 31, 1946	4
S. Rep. 1544, 77th Cong., 2d Sess.	9
S. Rep. 1057, 78th Cong., 2d Sess., p. 14	11-12

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 527

UNITED STATES OF AMERICA, *Petitioner*

v.

STANLEY KLINGER, WILLIAM CANTOR, AND MORRIS SANDLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, reversing respondents' convictions of conspiring to defraud the United States and dismissing the indictment on the ground that the prosecution of the offense was barred by the statute of limitations.

OPINION BELOW

The opinion of the Court of Appeals (R. 16-21) is reported at 199 F. 2d 645.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1952 (R. 21). On November 28, 1952, by order of Mr. Justice Jackson, the time within which to file this petition for a writ of certiorari was extended to and including January 2, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under the amended Wartime Suspension of Limitations Act, which suspended the "running" of any statute of limitations applicable to offenses involving fraud against the United States "until three years after the termination of hostilities", the applicable period of limitations began to run the day after the official termination of hostilities (December 31, 1946) or three years thereafter (December 31, 1949).

STATUTE INVOLVED

Section 1 of the Suspension Act of August 24, 1942, as amended by Section 28 of the Surplus Property Act of October 3, 1944 (c. 479, 58 Stat. 765, 781; 18 U.S.C. (1946 ed.) 590a), provided in pertinent part:

> Sec. 28. The first section of the Act of August 24, 1942 * * * as amended, is amended to read as follows:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *[1]

STATEMENT

On March 31, 1950, respondents were indicted for conspiracy to defraud the United States of the services of its employees in the control of sugar rationing (R. 2-8). The overt acts charged did not extend beyond December 1946.

The trial court denied motions to dismiss on the ground that the prosecution was barred by the statute of limitations (R. 9). Respondents were found guilty and were each sentenced to imprisonment for two years (R. 9-10).

The Court of Appeals for the Second Circuit reversed (R. 21), holding that the prosecution was barred by the statute of limitations. It ruled

---

[1] This provision, with changes in phraseology not here significant, was codified in the revision of the Criminal Code as 18 U.S.C. (Supp. V) 3287. The Reviser's Notes indicate that the sole purpose of the changes was to make permanent the otherwise temporary suspension provisions.

that the amended Wartime Suspension of Limitations Act, *supra*, pp. 2-3, which provides that "the running of any existing statute of limitations [applicable to crimes of fraud against the United States during wartime] * * * shall be suspended until three years after the termination of hostilities * * *" (December 31, 1946)[2], suspended the statute of limitations only during hostilities, so that the normal three-year period of limitations (18 U.S.C. (Supp. V) 3282) became operative the day after hostilities were declared terminated, *i.e.*, on January 1, 1947. Thus, the court's view was that, as to all crimes covered by the Suspension Act which occurred during hostilities, the terminal date for prosecution was December 31, 1949. The court conceded that under a literal reading of the Act the applicable three-year period did not commence to operate until three years after the termination of hostilities (*i.e.*, December 31, 1949), and thus did not run its course until December 31, 1952 (R. 17). It also recognized that in the original 1942 suspension statute (Act of August 24, 1942) Congress used the words, "the running of any existing statute of limitations * * * shall be suspended," in their literal sense (R. 17-18). Nevertheless, it refused to apply the literal interpretation to the Act

---

[2] Hostilities in World War II were officially declared terminated by Presidential Proclamation 2714, 12 F. R. 1, on December 31, 1946.

as amended in 1944. It read the word "running" in the later Act as meaning that the "bar" of the statute of limitations shall be suspended until the termination of hostilities.

REASONS FOR GRANTING THE WRIT

The decision of the court below—that as to crimes covered by the Suspension Act the statute of limitations began to run immediately on the termination of hostilities—is admittedly contrary to the language of the Act, is inconsistent with its legislative history and purpose, and is opposed to the views already expressed by a majority of this Court. It presents an important question in the administration of the criminal law, affecting a large number of pending cases.

1. The holding of the Court of Appeals is not only contrary to the literal words of the statute, which provides that the "*running* of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities" (italics supplied), but is also contrary to the interpretation accorded the Act by a majority of this Court in *United States* v. *Smith*, 342 U.S. 225. In the *Smith* case, five members of the Court joined in the opinion of Mr. Justice Douglas which held that the Suspension Act did not apply to offenses committed after the termination of hostilities (after December 31, 1946). The Court was not called upon to decide the question of the effect of

the Act on crimes committed during the period of hostilities. Nevertheless, the separate concurring opinion of Mr. Justice Clark (who joined in the majority opinion) explicitly states (342 U.S. at 231): "For those offenses which occurred between the date of the 1942 Act and the cessation of hostilities, Congress' intention was to give the Department of Justice six years from the latter date to investigate and prosecute." And the four members of the Court who joined in the dissenting opinion of Mr. Justice Minton expressed the view that Congress intended that until three years after the termination of hostilities, "there was to be no statute of limitations," and that on December 31, 1949, "the suspension was lifted, and the statute began to run again." 342 U.S. at 231. The plain purport of that opinion is that, as to offenses committed during hostilities, the statute did not begin to run until three years after the date of termination. Contrary to the belief of the court below (R. 18-19), nothing in the majority opinion or holding in the *Smith* case precludes the four dissenting Justices, or Mr. Justice Clark, from adhering to their reading of the statute as to the issue here involved. For the reasons given by Mr. Justice Clark (342 U. S. at 230-231), there is no incongruity in holding that, in the case of a crime committed during hostilities, the three-year limitations period began to run on December 31, 1949, but that for crimes

occurring after hostilities had ended the statute commenced to run on the very date of the crime.[3]

2. The question is an important one. We are advised that it affects the timeliness of well over one hundred prosecutions in which indictments have been filed but which have not as yet been brought to trial. Some of these prosecutions involve serious frauds against the Government in connection with surplus property disposal and war contracts. Many of these wartime crimes have come to light only after lengthy investigation by the various government agencies involved in widely scattered sections of the country, so that the issue is likely to arise in other circuits.[4] It is to the in-

---

[3] Nor is the dictum in the recent case of *United States* v. *Beacon Brass Co.*, 344 U.S. 43, authority for a contrary result. In holding that the indictment there involved, alleging a willful attempt to evade taxes under Section 145(b) of the Internal Revenue Code—an alleged attempt which was probably also a violation of former Section 35(A) of the Criminal Code—stated an offense within Section 145(b), this Court observed that the three year statute of limitations applicable to offenses under Section 35(A) had run. 344 U.S. at 45. But the possibility that the statute had been tolled by the suspension statute was neither raised nor presented to this Court for decision in that case. Further, the offense involved in the instant case is of the type clearly comprehended by the suspension statute—whether or not false statements made in an attempt to evade taxes are so covered.

[4] *United States* v. *Showalter*, 103 F. Supp. 806 (N.D. Cal.), is a district court holding contrary to that of the court below. The proposition that the Wartime Suspension of Limitations Act suspended the statute of limitations until December 31, 1949, when it then began to run, was assumed by the

terest of both the defendants in such cases and of the Government that the question be promptly decided.

Moreover, in the revision of the Criminal Code, the Wartime Suspension Act has been made permanent legislation applicable whenever the United States is at war. 18 U.S.C. (Supp. V) 3287. A definitive construction by this Court of the existing statute will enable Congress to determine whether amendment is necessary or desirable for future periods.[5]

Further, the decision of the court below may well create serious confusion and unnecessary problems in matters involving the tolling of statutes of limitation in general. It may be safely stated that, until the decision below, the phrase "running of the statute," had a definite and certain meaning.[6] See *infra*, p. 9, n. 7. That decision, if allowed to stand, will introduce into the interpretation of statutes of limitation, and their tolling provisions, an unexpected and needless complication.

3. The opinion below concededly rejects the literal interpretation of the words used by Con-

---

Court of Appeals for the Ninth Circuit in *Danebo Lumber Co.* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489, 491, and in *Furrow* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496, 499-450.

[5] As noted *infra*, p. 13, the Wartime Suspension of Limitations Act was also incorporated in the Uniform Code of Military Justice as Article 43(f) thereof, and will apply to military offenses of the same category.

gress, on the basis of a contrary intent which the court imputes to Congress. But the basis for imputing that contrary intent to Congress seems to be only the feeling of the court below as to what the proper policy should be. Such evidence as there is of Congressional intent is all to the contrary.

Thus, the opinion below admits that when in 1942 Congress passed the original Wartime Suspension Act, 56 Stat. 747, which provided that "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States * * * shall be suspended until June 30, 1945 * * *", it used the words of the statute in their literal sense. As the report quoted in the opinion below (S. Rep. 1544, 77th Cong., 2d sess.) makes clear, Congress intended that the time limitation should not be operative during the specified period of postponement, but should commence when that period expired. See also *United States* v. *Markowitz*, 34

---

[6] It is perhaps significant, in this connection, that although the opinion of Judge Learned Hand for the court below states that the term, "running" of the statute of limitations, is a "colloquial term" and not a "word of art" (R. 17), the opinion also states that the result of this case depends upon "whether the three year period of limitation * * * *began to run* on January 1, 1947, or on January 1, 1950" (R. 16-17). (Italics added.)

F. Supp. 827, 829-830 (N.D. Cal.).[7] Nowhere is there any indication that Congress had a different intention when it used exactly the same words, not in a new statute, but in an amendment which extended the life of the old. For the Suspension Act of 1944 amended the 1942 Act merely to provide, instead of the previously fixed terminal date of the suspension (*i.e.*, June 30, 1945), a period of suspension "until three years after the termination of hostilities * * *."

For the present problem, the most significant aspect of the legislative history of the Wartime Suspension of Limitations Act is that the two later amendments were promulgated during the latter part of the war when Congress was looking toward post-hostilities problems of reconversion. The first amendment of Section 1 of the Suspen-

---

[7] The phrase, "running of the statute of limitations", is defined in Bouvier's Law Dictionary, Rowle's 3d Revision, Vol. 2, as "a metaphorical expression, by which is meant that the time mentioned in the statute of limitations is considered as passing." *United States* v. *Markowitz*, *supra* (34 F. Supp. at pp. 829-830). This same definition of the phrase is contained at p. 1572, Black's Law Dictionary (3d ed.). This Court has frequently adverted to the "running" of a statute of limitations in this same sense. One such example was in *Hanger* v. *Abbott*, 73 U. S. 532, where, in answer to a contention that a statute of limitations continued to run despite the fact that the courts were closed during the civil war, this Court said (73 U.S. at p. 542):

> "* * * Peace restores the right and the remedy, and as that cannot be if the limitation *continues to run* during the period the creditor is rendered incapable to sue, it

sion Act of August 24, 1942, was by Section 19(b) of the Contract Settlement Act of July 1, 1944, c. 353, 58 Stat. 649, 667.[8] Representative Gwynne, a manager of the Contract Settlement Act in the House of Representatives, explained its suspension provision as follows (90 Cong. Rec. 6059-6060):

> In this bill we have some very drastic penalties for fraud. Let me call your attention

---

necessarily follows that the operation of the statute is also suspended during the same period." (Italics supplied.)

See also *United States* v. *Wiley*, 78 U.S. 508, where this Court said (at p. 513):

> "In *Hanger* v. *Abbott* it was decided that the effect of the war was to suspend the running of statutes of limitation during its continuance * * *."

[8] Section 19(b) provided: "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

> to them. In the first place, the running of the statute of limitations is suspended for 3 years after the war. That is, it ceases to run from the date the bill becomes effective until 3 years after the war; then it runs on until completion.

The Wartime Suspension of Limitations Act was again amended by Section 28 of the Surplus Property Act of October 3, 1944, c. 479, 58 Stat. 765, 781, *supra*, pp. 2-3. In its report on the bill (S. 2065) which became the Surplus Property Act, the Senate Committee on Military Affairs said (S. Rep. 1057, 78th Cong., 2d sess., p. 14):

> As was provided in the Contract Settlement Act of 1944, the statute of limitations with respect to offense against the laws of the United States arising in connection with activities under this act was suspended until 3 years after termination of hostilities in the present war. This provision has been necessitated by the magnitude of the operations involved under this act, and the intensive preoccupation of both participants and witnesses with the war effort. It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation.

The last sentence may be, as the opinion below states (R. 20), an equivocal way of saying that the bar of limitations should not fall for some period after the termination of hostilities, but it certainly points more in the direction of the literal reading of the statute than of the forced construction of the court below. And in the light of the fact that the amendment was merely extending a previous Act, the purport of which was admittedly clear, the sentence certainly furnishes no basis for departing from the plain meaning of the words used.[9]

At all times when the Wartime Suspension of Limitations Act was under Congressional scrutiny, a literal interpretation was given its language. This literal interpretation is fully consonant with the legislative purpose. For it is apparent that Congress intended in each instance to postpone the operation of statutes of limitation until a time when the intensive preoccupation of

---

[9] The Suspension Act was incorporated as Article 43(f) of the Act of May 5, 1950, the Uniform Code of Military Justice, 64 Stat. 107, 50 U.S.C. Supp. V, 618(f), which became effective on May 31, 1951. At pp. 1044-1046, Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498, 81st Cong., 1st Sess., the subcommittee discussion adverted to the fact that 18 U.S.C. 3287 (see *supra*, pp. 2-3) was being incorporated into the Uniform Code and that its effect would be to create a period of suspension subsisting until 3 years after hostilities were officially terminated, at which time the statute of limitations would commence to run against prosecutions of crimes of fraud.

the Government with hostilities and with post-hostilities reconversion (especially in the area of contract termination and the disposition of surplus property) would be over, and the Government could apply itself to detection and prosecution of hidden crimes which flourish in a war situation.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER J. CUMMINGS, JR.
Solicitor General.

DECEMBER 1952.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—[illegible]/P. O. [illegible]

No. 527

Office - Supreme Court, U.S.
FILED
MAR 7 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

UNITED STATES OF AMERICA,

Petitioner,

—v.—

STANLEY KLINGER, WILLIAM CANTOR and MORRIS SANDLER,

Respondents.

BRIEF ON BEHALF OF RESPONDENT SANDLER IN OPPOSITION

LOUIS BENDER,
Attorney for Respondent Sandler.

EUGENE H. NICKERSON,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1952

UNITED STATES OF AMERICA,

Petitioner,

—v.—

STANLEY KLINGER, WILLIAM CANTOR and MORRIS SANDLER,

Respondents.

BRIEF ON BEHALF OF RESPONDENT SANDLER IN OPPOSITION

Respondent Sandler opposes granting the writ for the reasons that (1) the question of statutory construction of the Wartime Suspension of Limitations Act is of no general importance because even under the government's contention, the statute cannot apply to any future prosecution; and (2) there is no conflict of opinion between Courts of Appeals.

Opinion Below

The opinion of L. Hand, *Circuit Judge* (concurred in by Swan, *Chief Judge,* and Frank, *Circuit Judge*) (R. 16-21),* is reported at 199 F. 2d 645.

---

* References to "R" indicate record printed by petitioner. References to "CAR" indicate Court of Appeals' record on file in this Court.

Reasons for Denying the Writ

Respondents were indicted on March 31, 1950 for alleged conspiracy to defraud the United States by impairing, obstructing or defeating the rationing of sugar by the Office of Price Administration. The alleged conspiracy admittedly did not last beyond December 31, 1946, the date of official termination of wartime hostilities, and thus the indictment was found more than three years after the end of hostilities.

The Court below held that the prosecution was barred by the three year statute of limitations* (concededly applicable), and rejected the government's argument that under the Wartime Suspension of Limitations Act, the statute of limitations did not even commence to run for three years after termination of hostilities. The pertinent wording of the Suspension Act provides that the "running" of the applicable statute of limitations "shall be suspended until three years after the [official] termination of hostilities in the present war." 18 U. S. Code (1946 ed.) 590a.

1. It is plain that the construction of a statute which can have no effect on future prosecutions, no matter what interpretation is given, is not such a pressing matter as to justify the attention of this busy Court. Even under the government's contention, indictments not found prior to December 31, 1952 are barred by the three year statute of limitations. A construction favorable to the government would not, therefore, permit future prosecutions of violations which have been lately discovered. Conversely, a construction favorable to respondent cannot have any general deleterious effect on law enforcement by the government. It is true that the Solicitor General states he is

---

* 18 U. S. Code §3282.

"advised" that the question of interpretation is involved in over one hundred indictments not yet brought to trial. Even assuming this to be so, it can hardly be supposed that the deterrent effect of the criminal law will be materially lessened by dismissal of indictments for violations long since committed, where the dismissal is on grounds not available to future offenders. A "suspension" statute may have substantial deterrent effect during wartime, so that potential violators will not hope for escape because of the government's preoccupation with the war. But, by hypothesis, the construction, or indeed the past existence, of such a statute can have no deterrent effect where it cannot apply to any potential offender.

The Solicitor General does not make out a better case in this regard by claiming that "some of these prosecutions involve serious frauds against the government in connection with surplus property disposal and war contracts" (p. 7 of the petition). The statutory agencies are no longer in existence. The statutes which created such wartime agencies and empowered their actions have been repealed, and just as in the instant case involving the Office of Price Administration, the government is not confronted with any present problem as to future violations.

But more importantly, it is inconceivable that the Solicitor General can characterize the types of frauds as he did above, in view of the fact that in a letter under date of February 20, 1953 to Louis Bender, attorney for the respondent Morris Sandler, the Solicitor General says in part:

> "I have your letter of February 18 requesting a list of the prosecutions referred to in our petition for a writ of certiorari in this case. You asked for the dates of such prosecutions and the nature of the crimes charged.

> "I regret that we cannot furnish you this information. The statement in our petition to which you referred was based upon a canvass we made in December 1952 among the United States attorneys in continental United States. In that canvass and in the replies we received, the details as to the names of cases, dates of offenses and indictments, and the nature of the crimes involved were not elicited. Our effort was simply to get, within the limited time available to us, the number of cases affected by the *Klinger* decision of the Second Circuit."

The Solicitor General has made an assumption which is wholly unwarranted in view of his letter, wherein he advises that he is completely unaware of the nature of the crimes involved in the alleged one hundred or more prosecutions pending.

Equally unpersuasive is the government's contention that the Court should take this opportunity to interpret the Wartime Suspension Act because similar language has been inserted in the Criminal Code, to be applicable whenever the United States is "at war." 18 U. S. Code §3287. Since the United States is not presently "at war," there are no prosecutions pending or proposed involving this provision of the Code. Its construction at this time would thus be purely academic.

2. It is not contended that there are divergent opinions in the Courts of Appeals.* Therefore, there is no occasion

---

* *United States* v. *Showalter*, 103 F. Supp. 806 (D. C. N. D. Cal. 1952) is said to be contrary to the decision below. However, no conflict in the Courts of Appeals for the Circuits can arise on this decision as we have been informed by the office of the Attorney General that the criminal information in that case was dismissed on motion of the government in April or May, 1952.

to make the administration of justice uniform throughout the circuits.

3. While the merits of the decision below is not in issue, the opinion (R. 16-21) of L. Hand, *Circuit Judge,* is highly persuasive. To give the Wartime Suspension of Limitations Act a construction which would more than double the existing period of limitation for crimes committed prior to January 1, 1947 would bring about a result which, in Judge Hand's words, "we cannot imagine that Congress would have countenanced" (R. 18).

Furthermore, such an extension of the limitation period would have particularly harsh effects in cases such as this, where it appears that Office of Price Administration records were destroyed long before the present indictment, except for those records which the government or any of its agencies wanted to preserve (CAR. 1999). Except for records necessary for its prosecution, the Department of Justice did not attempt to preserve any other records relating to the respondents and material to the issues in this case (CAR. 1603-1604). Consequently, official records which were admissible in evidence as either exculpatory, explanatory or contradictory of the government's case were not available to the defense (CAR. 2013-2014). This is an added but significant objection to more than doubling the statute of limitations.

It is respectfully submitted that the petition for a writ of certiorari be denied.

LOUIS BENDER,
Attorney for Respondent Sandler.

EUGENE H. NICKERSON,
of Counsel.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	5
Summary of argument	5
Argument	
The Wartime Suspension Act suspended the running of the applicable statute of limitations and the court below erred in holding that the bar of the statute had fallen prior to the instant prosecutions	8
A. The express terms of the Suspension Act define the period during which limitation periods applicable to certain categories of crimes are to be held in abeyance	8
B. The history of the Wartime Suspension Act shows that Congress intended to extend the period of suspension until three years after hostilities had terminated, at which time the limitations period which had been arrested during that period would commence to run again	13
C. No considerations of policy justify the refusal to apply the clear and plainly intended meaning of the words used by Congress	19
Conclusion	22

CITATIONS

Cases:

Bond v. *Jay*, 7 Cranch 350	10
Braun v. *Sauerwein*, 10 Wall. 218	6, 12
Bridges v. *United States*, No. 548, this Term	22
Brown v. *Hiatts*, 15 Wall. 177	11
Cope v. *Anderson*, 331 U.S. 461	10
Danebo Lumber Co. v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489	13
Falter v. *United States*, 23 F. 2d 420, certiorari denied, 277 U.S. 590	22
Furrow v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496	13
Graydon v. *Sweet*, 1 Woods 418, Fed. Cas. No. 5,733	18
Hanger v. *Abbott*, 6 Wall. 532	6, 11

Cases—Continued

	Page
Miller v. *United States*, 24 F. 2d 353, certiorari denied, 276 U.S. 638	22
Salvoni v. *Pilson*, 181 F. 2d 615, certiorari denied, 339 U.S. 981	12
Tyson v. *United States*, 76 F. 2d 533	12
United States v. *Gottfried*, 165 F. 2d 360, certiorari denied, 333 U.S. 860	22
United States v. *Gower*, 71 F. 2d 366	12
United States v. *Markowitz*, 34 F. Supp. 827	12
United States v. *Showalter*, 103 F. Supp. 806	13
United States v. *Smith*, 342 U.S. 225	2, 5, 7, 8, 19
United States v. *Wiley*, 11 Wall. 508	6, 11

Statutes:

Act of October 10, 1942, 56 Stat. 781	14
Suspension Act of 1942, 56 Stat. 781	6-7, 13, 14
Suspension Act of 1942, 56 Stat. 781, amended by Section 19(b) of the Contract Settlement Act of July 1, 1944, c. 353, 58 Stat. 649	7, 15
Suspension Act of August 24, 1942, as amended by Section 28 of the Surplus Property Act of October 3, 1944 (c. 479, 58 Stat. 765, 761; 18 U.S.C. (1946 ed) 590a); codified in the revision of the Criminal Code as 18 U.S.C. (Supp. V) 3287, Section 1	2, 4, 5, 7, 8, 16, 18
Uniform Code of Military Justice, Act of May 5, 1950, 64 Stat. 107, 50 U.S.C., Supp V., 618 (f), Article 43(f)	18
18 U.S.C. 582, now 18 U.S.C. 3282	9

Miscellaneous:

Black, *Law Dictionary* (3rd ed.) p. 1572	10
Bouvier, *Law Dictionary*, Rawle's 3rd Revision, Vol. 2	6, 10
1190 Cong. Rec. 6059-6060	7, 16
H. R. 6484, 77th Cong., 1st sess.	13
Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498, 81st Cong., 1st sess.	18
Presidential Proclamation 2714 of December 31, 1946, 12 F.R. 1	4
S. 2065, 78th Cong., 2d Sess.	16
S. Rep. 1057, 78th Cong., 2d sess, p. 14	16
S. Rep. 1544, 77th Cong., 2d sess.	14
S. Rep. 1592, 77th Cong., 2d sess.	14

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 527

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY KLINGER, WILLIAM CANTOR, AND MORRIS SANDLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 16-21) is reported at 199 F. 2d 645.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1952 (R. 21). On November 28, 1952, by order of Mr. Justice Jackson, the time within which to file the petition for a writ of certiorari was extended to and including January 2, 1953. The petition was filed on December 31, 1952, and was granted on April 6, 1953 (R. 25). The jurisdiction of this Court is invoked under 28 U. S. C.

1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under the amended Wartime Suspension of Limitations Act, which suspended the "running" of any statute of limitations applicable to offenses involving fraud against the United States "until three years after the termination of hostilities", the applicable period of limitations began to run the day after the official termination of hostilities (December 31, 1946) or three years thereafter (December 31, 1949).

STATUTE INVOLVED

Section 1 of the Suspension Act of August 24, 1942, as amended by Section 28 of the Surplus Property Act of October 3, 1944 (c. 479, 58 Stat. 765, 781; 18 U. S. C. (1946 ed.) 590a), provided in pertinent part:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *[1]

[1] This provision, with changes in phraseology not here significant, was codified in the revision of the Criminal Code as 18 U.S.C. (Supp. V) 3287. The Reviser's Notes indicate that the sole purpose was to make permanent the otherwise temporary suspension provision. See *United States* v. *Smith*, 342 U.S. 225, 226 n. 1.

STATEMENT

On March 31, 1950, respondents were indicted for conspiracy in 1946 to defraud the United States of the services of its employees in the control of sugar rationing (R. 2-8). The indictment alleged that petitioners Klinger and Cantor were investigators in the Food Section of the Enforcement Division of the Office of Price Administration at New York City, and that various co-conspirators were persons engaged in the food business who maintained sugar ration bank accounts at various banks.[2] The scheme described in the indictment was to have the co-conspirators, at the direction of the defendants,[3] set up sugar ration accounts, overdraw their allotment, and sell the sugar thus obtained on the black market, at prices far in excess of the maximum ceiling prices. In pursuance of the conspiracy, the defendants, who were employees of O.P.A., would merely recommend suspension of the co-conspirators from further dealings in sugar and would not refer their cases for criminal prosecution. The conspiracy was alleged to have begun about January 1, 1946, and the overt acts charged did not extend beyond December 1946.

The trial court denied motions to dismiss which were based on the ground that the prosecution was

[2] Above the consumer level, the sugar ration system was operated in a manner similar to a bank check account. Retailers or wholesalers were given an allotment for a certain amount of sugar which was filed in a bank as a deposit. When sugar was purchased, a ration check for the amount purchased, drawn on the bank where the allotment was filed, was given to a supplier and eventually debited from the buyer's account. If accounts were overdrawn, the bank would notify the Office of Price Administration of the overdraw.

[3] Petitioner Sandler, who was named in a number of the overt acts (R. 6-8) was shown at the trial to have been the principal supplier of sugar.

barred by the statute of limitations (R. 9). Respondents were found guilty after trial and were each sentenced to imprisonment for two years (R. 9-10).

The Court of Appeals for the Second Circuit reversed (R. 21), holding that the prosecution was barred by the three year statute of limitations applicable to such crimes. It interpreted the language of the 1944 Suspension of Limitations Act (*supra*, p. 2)—* * * "the running of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities * * *"[4]—as lifting the *bar* of the applicable three year statute of limitations until December 31, 1949. As to all crimes subject to a three year statute of limitations and comprehended by the Suspension Act, the court held that the bar of the statute fell on December 31, 1949. The instant prosecutions which were begun after that date were, therefore, ordered dismissed.

The court recognized that the original 1942 Suspension Act, the immediate predecessor of the 1944 Act, containing precisely the same words—"the running of any existing statute of limitations * * * shall be suspended * * *"—was properly interpreted in its literal sense, *i.e.*, that the "running" of the limitations statute was suspended and could not mean that the "bar" of the statute was lifted for the period described by that Act (R. 17-18). It also conceded that the literal language of the 1944 Act meant that the period of suspension lasted until

---

[4] Hostilities in World War II were officially declared terminated by Presidential Proclamation 2714 on December 31, 1946. 12 F.R. 1.

December 31, 1949, at which time the limitations period began to run, and, accordingly, the terminal date for prosecutions was December 31, 1952 (R. 17). Nevertheless, because of the court's view of policy considerations, and because of its reading of the opinions of this Court in *United States* v. *Smith*, 342 U. S. 225, it refused to accord to the 1944 Act its literal interpretation, but read the word "running" in that Act to read "bar."

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the instant indictment was barred by the three-year period of limitations.

2. In holding that, under the Wartime Suspension of Limitations Act, providing that, as to certain crimes, "the running of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities", the period of limitations, as to an offense completed by the time of the termination of hostilities on December 31, 1946, began to run the day after cessation of hostilities, instead of three years later.

3. In interpreting the word "running" in the Wartime Suspension Act as meaning that the bar of the statute of limitations was suspended until three years after hostilities.

SUMMARY OF ARGUMENT

I

1. The Suspension Act provides in terms that "the running of any existing statute of limitations" applicable to certain crimes "shall be suspended until three years after the termination of

hostilities in the present war." It is conceded by the court below that, literally read, this means that the time from the first enactment of the statute, *i.e.*, August 24, 1942, until three years after the termination of hostilities, *i.e.* December 31, 1949, was not to be counted as time when the period of limitations was operative, with the result that the instant prosecution was not barred until December 31, 1952. The court below, however, read the word "running" as meaning that the "bar" of the statute of limitations was suspended until three years after hostilities, with the result that as to all prosecutions for which the normal period of limitations would have expired between August 24, 1942 and December 31, 1949, the terminal date for prosecution was December 31, 1949.

There is no justification for refusing to apply the literal language. "The running of the statute of limitations" is a legal phrase consistently used to mean "that the time mentioned in the statute of limitations is considered as passing." Bouvier, *Law Dictionary,* Rawle's 3rd Revision, Vol. 2. More particularly, the sentence "the running of the statute is suspended" or its equivalent has consistently been used by the courts in accord with the obvious and literal meaning of counting out from the period of limitations the period of suspension. *E.g., Hanger* v. *Abbott,* 6 Wall. 532, 542; *United States* v. *Wiley,* 11 Wall. 508, 513; *Braun* v. *Sauerwein,* 10 Wall. 218, 223. A sentence so consistently used in accord with its literal meaning should not now be given a different construction.

2. There are affirmative indications that, in the statute here involved, Congress used the words in their classic sense. As originally enacted in 1942,

the Wartime Suspension Act read: "* * * the running of any existing statute of limitations * * * shall be suspended until June 30, 1945." It is conceded by the court below that in this 1942 statute, Congress used the words the "running of any existing statute of limitations * * * shall be suspended" in their literal sense. To have construed "running" as meaning "bar" in the 1942 Act would have rendered it largely meaningless as to wartime crimes, since the normal three-year period of limitations as to crimes committed after August 24, 1942 would extend beyond June 30, 1945.

The 1944 Act here involved, which amended the 1942 act, used exactly the same words; it merely substituted for the fixed date of June 30, 1945, the date "three years after the termination of hostilities." There is thus no warrant for the conclusion of the court below that in the amending act of October 3, 1944, the word "running" somehow took on an esoteric meaning different from the sense in which it had been used in the statute being amended.

The substitution of the phrase "three years after the termination of hostilities" for the fixed date of June 30, 1945, was first made by the Contract Settlement Act of July 1, 1944. The manager of that act in the House of Representatives explained the provision as meaning that the statute of limitations "ceases to run from the date the bill becomes effective until 3 years after the war; then it runs on until completion." 1190 Cong. Rec. 6059-6060. This explanation of what is essentially the same legislation as that here involved clearly rebuts the holding of the court below.

3. The holding of this Court in *United States* v. *Smith*, 342 U. S. 225, to the effect that the Suspen-

sion Act does not apply to offenses committed after the termination of hostilities does not, as the court below seems to have thought, support the decision below. This Court, in the *Smith* case, was not called upon to decide the question of the effect of the Act on crimes committed during hostilities. The determination that the Act applied only to wartime crimes does not mean that, as to such wartime crimes, a period after the war cannot be counted out of the period of limitations.

Fundamentally, the opinion below rests on the court's disapproval of the results which flow from the normal, literal construction of the statute. Had the statute suspended the running of the statute of limitations until six months after the termination of hostilities, the court below would probably not have felt constrained to read the statute in any but its classic sense. We submit that there is no justification for adopting a distorted construction of plain words merely because the time period fixed by Congress does not seem to the court a wise one.

ARGUMENT

The Wartime Suspension Act Suspended the Running of the Applicable Statute of Limitations and the Court Below Erred in Holding That the Bar of the Statute Had Fallen Prior to the Instant Prosecutions.

A. *The express terms of the Suspension Act define the period during which limitation periods applicable to certain categories of crimes are to be held in abeyance.*

The Suspension Act provides in terms that "the running of any existing statute of limitations" applicable to certain crimes "shall be suspended until three years after the termination of hostili-

ties in the present war * * *." This language on its face creates a period during which the "running" of limitation statutes are to be held suspended, *i. e.*, held in abeyance, and at the termination of which they will commence to run again. The beginning of that period of suspension is August 24, 1942, when the Act was originally passed, and the terminal date is "three years after the termination of hostilities in the present war", *i. e.*, December 31, 1949. Thus, until December 31, 1949, there was no statute of limitations for the applicable crimes, but on January 1, 1950, all limitations periods began to run their normal course. As to crimes committed after August 24, 1942, subject to the normal three year limitation period established by 18 U. S. C. (1946 ed.) 582,[5] the period of limitations expired December 31, 1952. As to crimes committed before August 24, 1942, and against which the limitation provision had already partially run before the suspension period commenced, only so much of the limitation period as was left would run after December 31, 1949.

This simple and obvious construction wholly accords with the words used by Congress. The decision below admits that this is the construction which must follow from a literal reading of the words used. Nevertheless, the court below read the word "running" to mean "bar" and held that the statute meant that the "bar" of any existing statute of limitations was suspended until three years after the period of hostilities. The result followed that as to all prosecutions for which the normal period

[5] In 1948, Section 582 was incorporated in the Revised Code as 18 U.S.C. 3282.

of limitations would have expired at any time between August 24, 1942, and December 31, 1949, the terminal date for prosecution was December 31, 1949.

As a means of escaping from the unequivocal language of the statute, the court below stated that "running" is a "colloquial term" and not a "word of art." (R. 17.) Even assuming that this were so, the most reasonable interpretation to give to a "colloquial term" is to use the word in its ordinary sense. And certainly, in common terminology, in relation to time, "running" means the passing of time and not the "bar" of the passage of time.

Actually, however, the phrase "running of the statute of limitations" is not so "colloquial" as it is a traditional legal phrase of certain meaning. It is defined in the law dictionaries as "a metaphorical expression, by which is meant that the time mentioned in the statute of limitations is considered as passing." Bouvier, *Law Dictionary*, Rawle's 3rd Revision, Vol. 2; Black, *Law Dictionary* (3rd ed.) p. 1572. It is used by lawyers and judges frequently and always with the same meaning. In determining when periods of limitations start, this Court has consistently from the time of Chief Justice Marshall spoken of the time when the statute has commenced "to run." *E. g., Bond* v. *Jay*, 7 Cranch 350, 354 ("the statute has never commenced to run"); *Cope* v. *Anderson* 331 U. S. 461, 464 ("the question of when the applicable state statute of limitations begins to run"). In fact, the phrase is so automatic a part of the lawyer's vocabulary that the opinion below, although holding that the term "running" means "bar," states that the

result of this case "depends upon whether the three year period of limitation * * * *began to run* on January 1, 1947, or on January 1, 1950" (italics added) (R. 16-17).

More particularly, the sentence, "the running of the statute is suspended" or its equivalent has a long history of use, always in accord with the obvious and literal meaning of counting out or tolling from the period of limitations the period of suspension. In answer to a contention that a statute of limitations continued to run despite the fact that the courts were closed during the Civil War this Court stated: "* * * Peace restores the right and the remedy, and as that cannot be if the limitation *continues to run* during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also *suspended* during the same period." (Italics supplied.) *Hanger* v. *Abbott*, 6 Wall. 532, 542. In *United States* v. *Wiley*, 11 Wall. 508, 513, this Court said of *Hanger* v. *Abbott*:

> "* * * it was decided that the effect of the war was to suspend the running of statutes of limitation during its continuance."[6]

Nor has this phraseology been confined to suspen-

[6] See also *Brown* v. *Hiatts*, 15 Wall. 177, where this Court, in addressing itself to the effect that a period of war had on the running of the statute of limitations, said (pp. 183-184):

"* * * And so far as the operation of the statute of limitations is concerned, it was held in the same case that the war continued until proclamation was in like manner officially made of its close. That occurred on the 2d day of April, 1866. The period, therefore, between the 27th day of April, 1861, and the 2d of April, 1866, must be excluded in the computation of the time during which the statute has run against the right of action of the complainant on the bond and mortgage in suit, and being excluded the present suit is not barred."

sion during war. In *Braun* v. *Sauerwein*, 10 Wall. 218, a federal statute was assumed to have taken out of a state statute of limitations the period during which an appeal was pending before the Commissioner of Internal Revenue. In referring to this statute, this Court said (p. 223):

> It seems, therefore, to be established, that the *running of a statute of limitation may be suspended by* causes not mentioned in the statute itself. Assuming, then, that the act of Congress did, for a time, *stop the running of the Maryland statute* against the plaintiff, the inquiry remains, how long did the suspension continue? [Italics supplied.]

See also *Tyson* v. *United States*, 76 F. 2d 533, where the Court of Appeals for the Fourth Circuit said (p. 535):

> The suspension of a statute of limitations for a certain period is, in effect, "time taken out," for that period and adds the same period of time to the limitations provided in the statute.

Cf. *Salvoni* v. *Pilson*, 181 F. 2d 615 (C.A. D.C.), certiorari denied, 339 U.S. 981; *United States* v. *Gower*, 71 F. 2d 366, 369 (C.A. 10).[7]

---

[7] See also *United States* v. *Markowitz*, 34 F. Supp. 827 (N.D. Cal.). District Judge Welsh, addressing himself to an argument similar to the position taken by the Court below, said (p. 829):

"If the term 'suspension of the running of the statutory period of limitations' were synonymous with the term 'suspension of the expiration date of the statutory period of limitations', there would be merit to defendant's contention that this action was barred on December 31, 1938. But the running of a period of time is not generally understood to refer

In sum, judicial interpretations of the phrase "suspension of the running of the statute of limitations" have been uncommonly uniform, and, significantly, the court below cited no authority for its contrary position. In view of the traditional and consistent meaning of the phrase, the distortion of the word "running" to mean "bar" by the court below is completely unwarranted.

B. *The history of the Wartime Suspension Act shows that Congress intended to extend the period of suspension until three years after hostilities had terminated, at which time the limitations period which had been arrested during that period would commence to run again.*

As originally enacted in 1942, the Wartime Suspension Act read "* * * the running of any existing statute of limitations * * * shall be suspended until June 30, 1945 * * *".[8]

---

to the expiration point of that period. In Bouvier's Law Dictionary, Rawle's 3d Revision, Vol. 2, the term 'running of the statute of limitations' is defined as, 'a metaphorical expression by which is meant that the time mentioned in the Statute of Limitation is considered as passing.' * * * When the running of the statutory period of limitations is suspended, the limitation period is arrested; it is prevented from running any further during the time of the suspension, and when the time of suspension is over, the statutory period of limitations commences to run again."

The proposition that the Wartime Suspension of Limitations Act suspended the statute of limitations until December 31, 1949, when it then began to run, was assumed by the Court of Appeals for the Ninth Circuit in *Danebo Lumber Co.* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489, 491, and in *Furrow* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496, 499-500. *United States* v. *Showalter*, 103 F. Supp. 806 (N.D. Cal.), is a district court holding contrary to that of the court below.

[8] H.R. 6484, which became the 1942 Suspension of Limitations Act, provided "that the running of any existing statute of limitations applicable to offenses involving the defrauding

The opinion below concedes that, in the 1942 statute, the words "running of any existing statute of limitations * * * shall be suspended" were used in the literal sense (R. 17-18). The Senate report on the bill (S. Rep. No. 1544, 77th Cong., 2nd Sess.) states that action should be taken "to insure that the limitations statute will not operate, under stress of the present-day events." To have construed "running" as meaning "bar" in that Act would have rendered the Act largely meaningless as to wartime crimes. For the normal three year period of limitations as to crimes committed after August 24, 1942, would extend beyond June 30, 1945. Thus, without question, the 1942 Act meant that the pe-

---

or attempts to defraud the United States * * * shall be suspended for the period of the present war and for 6 months thereafter." The Senate substituted the fixed dates, or "such earlier time" as Congress or the President may designate.

Contemporaneously with the enactment of the Act of August 24, 1942, the Act of October 10, 1942, 56 Stat. 781, was enacted. This Act provided that "the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States * * * shall be suspended until June 30, 1945 * * *." This legislation was explained in a Senate Report of the Committee on the Judiciary as follows (S. Rep. 1592, 77th Cong., 2d Sess.):

> This committee had previously reported favorably the bill (H.R. 6484), to suspend the running of the statute of limitations applicable to frauds against the United States, which bill has been enacted into law, approved by the President and is Public Law No. 706. This bill (S. 2731) will accomplish the same purpose as to violations of the antitrust laws, both civil and criminal.
>
> Specifically it suspends the statute of limitations applicable to violation of the antitrust laws of the United States until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. The date is selected because it is 6 months after December 31, 1944, which has been used by the Congress as the estimated date of the termination of the war and it is felt that the suspension should continue 6 months after the termination of the war.

riod from August 24, 1942, to June 30, 1945, was not to be counted as time when the statute of limitations was running.

The 1944 Act contains precisely the same words of import as does the 1942 Act: "the running of any existing statute of limitations * * * shall be suspended." The only change is that instead of the fixed terminal date in the 1942 Act, June 30, 1945, the date in the 1944 Act is "three years after the termination of hostilities." There is absolutely no basis for the conclusion of the court below that, in the amending Act of October 3, 1944, in the 1944 statute, the word "running" somehow took on an esoteric meaning different from the obvious and previous one it had in the statute being amended.

There is not only no indication of any intent on the part of Congress to change the meaning of the word, but there is substantially contemporaneous expression of an intent that the word "running" was to be used in exactly the same classic sense that it had been in the 1942 statute. The first amendment to the Suspension Act of 1942 was by Section 19(b) of the Contract Settlement Act of July 1, 1944, c. 353, 58 Stat. 649, 667.[9] Representative

---

[9] Section 19(b) provided: "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President

Gwynne, a manager of the Contract Settlement Act in the House of Representatives, explained its suspension provision as follows (90 Cong. Rec. 6059-6060):

> In this bill we have some very drastic penalties for fraud. Let me call your attention to them. In the first place, the running of the statute of limitations is suspended for 3 years after the war. That is, it ceases to run from the date the bill becomes effective until 3 years after the war; then it runs on until completion.

This explanation of the operation of what is, for present purposes, essentially the same legislation with which we are here concerned, clearly refutes the holding of the court below.

The Wartime Suspension of Limitations Act was again amended by Section 28 of the Surplus Property Act of October 3, 1944, c. 479, 58 Stat. 765, 781, *supra*, p. 2. In its report on the bill (S. 2065) which became the Surplus Property Act, the Senate Committee on Military Affairs said (S. Rep. 1057, 78th Cong., 2d Sess., p. 14):

> As was provided in the Contract Settlement Act of 1944, the statute of limitations with respect to offense against the laws of the United States arising in connection with activities under this act was suspended until 3 years after termination of hostilities in the present war. This provision has been necessitated by

---

or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

> the magnitude of the operations involved under this act, and the intensive preoccupation of both participants and witnesses with the war effort. It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation.

The opinion below states (R. 20) that the last sentence of the above paragraph is an equivocal way of saying that the bar of limitations should not fall for some period after the termination of hostilities. To the contrary, however, it clearly points more in the direction of the literal reading of the statute than of the forced construction of the court below. In the light of the fact that the Amendment was merely extending a previous Act, the purport of which was admittedly clear, and in the light of the fact that the meaning of precisely similar words had been clearly explained a short time before, the sentence certainly furnishes no basis for departing from the plain meaning of the words used.

Indeed, the very labelling of this statute as a "Suspension Act" rebuts the tenuous rationale of the court below. There is an obvious difference between suspension acts which create *periods of suspension, i. e.,* periods when no time limitation can run against the crimes to which it is applicable, and statutes of limitation which create *limitations periods, i. e.,* periods during which time limitations are applicable. A suspension act "does not specify any time within which an action shall be brought," "an essential feature belonging to a statute of limi-

tations," and does not limit the time when the limitation period begins to run and when it is tolled except by implication; it merely creates a period when the time limitation is held in abeyance. *Graydon* v. *Sweet*, 1 Woods 418, Fed. Cas. No. 5,733 (C. C. W. D. Tex.). The Suspension Act did not purport to indicate the date when the statute of limitations would bar prosecutions. Rather, it defined the period during which it would not be operative at all.

At all times when the Wartime Suspension of Limitations Act was under Congressional consideration, a literal interpretation was given its language.[10] This literal interpretation is fully consonant with the legislative purpose. For it is apparent that Congress intended in each instance to postpone the operation of statutes of limitation until a time when the intensive preoccupation of the Government with hostilities and with post-hostilities reconversion would be over, and the Government could apply itself to detection and prosecution of hidden crimes which flourish in a war situation.

---

[10] The Suspension Act was incorporated as Article 43(f) of the Act of May 5, 1950, the Uniform Code of Military Justice, 64 Stat. 107, 50 U.S.C., Supp. V, 618(f), which became effective on May 31, 1951. At pp. 1044-1046, Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498, 81st Cong., 1st Sess., the subcommittee discussion adverted to the fact that 18 U.S.C. 3287 (see *supra*, p. 2) was being incorporated into the Uniform Code and that its effect would be to create a period of suspension subsisting until 3 years after hostilities were officially terminated, at which time the statute of limitations would commence to run against prosecutions of crimes of fraud.

C. *No considerations of policy justify the refusal to apply the clear and plainly intended meaning of the words used by Congress.*

The refusal of the court below to adopt the plain meaning of the literal language of the statute appears to stem from its interpretation of the decision of this Court in *United States* v. *Smith*, 342 U. S. 225. The *Smith* case arose out of prosecutions for crimes committed after the termination of hostilities, *i. e.*, in 1947. This Court held that the Suspension Act did not apply to such offenses and, that, consequently, the three-year statute of limitations for those offenses had not been suspended for *any* period. The dismissal of the indictments was therefore affirmed. It is obvious that the problem with which the Court was faced in *Smith* was whether offenses committed after the termination of hostilities were comprehended by the Suspension Act, and that the Court decided merely that the statute of limitations was not suspended at all for such offenses. That the Court did not decide any question as to the effect of the Act on crimes committed *during* the period of hostilities (as was the crime here involved) is made clear, not only from the opinion of Mr. Justice Douglas, writing for the majority of the Court, but also from the separate concurring opinion of Mr. Justice Clark, who joined in that opinion to make a majority of five. Mr. Justice Clark expressly stated (342 U. S. at 231): "For those offenses which occurred between the date of the 1942 Act and the cessation of hostilities, Congress' intention was to give the Department of Justice six years from the latter

date to investigate and prosecute." The court below, therefore, was manifestly in error when it relied upon the opinion of Mr. Justice Douglas as support for its result in this case.

But even if Mr. Justice Douglas' opinion could be read as did the court below, the uncontrovertible fact is that five members of this Court in *Smith* took a position diametrically opposed to that view. Accordingly, that opinion cannot be deemed controlling here. For the four members of this Court who joined in the dissenting opinion of Mr. Justice Minton expressed the view that Congress intended that until three years after the termination of hostilities, "there was to be no statute of limitations," and that on December 31, 1949, "the suspension was lifted, and the statute began to run again." 342 U. S. at 231. The plain purport of that opinion is that, as to offenses committed during hostilities, the statute did not begin to run until three years after the date of termination. The opinion of Mr. Justice Douglas certainly does not require the result reached by the court below. Contrary to the belief of the court below (R. 18-19), nothing in that opinion, as we have shown, precludes the four dissenting Justices, or Mr. Justice Clark, from adhering to their reading of the statute as to the issue here involved. There is no incongruity in holding that, in the case of a crime committed during hostilities, the three-year limitations period applicable in this case began to run on December 31, 1949, but that for crimes occurring after hostilities had ended, the statute commenced to run on the very date of the crime.

Fundamentally, as the opinion itself makes

clear, the refusal of the court below to follow the plain meaning of the statute stems from its disapproval of the doubling of the statute of limitations which flows from the normal, obvious construction. (R. 18, 20.) Had the statute read "the running of any existing statute of limitations * * * shall be suspended until *six months* after the termination of hostilities" the court below probably would not have felt constrained to read the statute in any but its literal well-established sense. There is no justification for adopting a distorted construction of plain words merely because the time period fixed by Congress does not seem to the court a wise one. By every standard of construction—the literal meaning of the words used, the settled judicial construction of the words used, the sense in which the words were used in the original statute of which the act in question is merely an amendment, the interpretation given to the words by the legislators responsible for the legislation—the words of the statute that "the running of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities" means that, as to offenses committed during hostilities, the period before December 31, 1949 cannot be counted as a period during which the statute of limitations was running. Hence, the indictment in the instant case was not barred, and the decision below should be reversed."

" This case also involves the question not decided by the court below, as to whether the crime charged, a conspiracy to defraud the United States—in this case of the faithful services of its employees and of the proper functioning of its sugar rationing control—is a crime involving fraud under the Suspension Act. It seems clear that, had the court below passed upon the question, it would have held the crime to be an

CONCLUSION

The judgment below should be reversed and the cause remanded to the Court of Appeals for determination of the issues, other than those relating to the statute of limitations, raised by respondents.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

APRIL 1953

---

offense covered by the Suspension Act, since in *Miller* v. *United States*, 24 F. 2d 353, certiorari denied, 276 U.S. 638, the Second Circuit had held that a 1921 proviso, extending the period of limitations as to crimes "involving fraud against the United States", applied to a charge of conspiracy to defraud the United States—in that case of the impartial services of its employees with respect to a claim before the Alien Property Custodian. See also *Falter* v. *United States*, 23 F. 2d 420 (C.A. 2), certiorari denied, 277 U.S. 590. Moreover, in *United States* v. *Gottfried*, 165 F. 2d 360, certiorari denied, 333 U.S. 860, the Court of Appeals for the Second Circuit held that the 1942 Suspension Act applied to the crime of making false statements—in that case to the Office of Price Administration in order to get larger sugar allocations. We discuss the foregoing cases in detail in the brief for the Government in *Bridges* v. *United States*, No. 548, this Term, to which we respectfully refer the Court.

In addition, respondents raised before the Court of Appeals a number of contentions relating to the sufficiency of the evidence and alleged errors at the trial, none of which the court below found necessary to reach. Respondents obtained leave from the court below to proceed *in forma pauperis* on a typewritten record. Since the transcript of all the testimony at the trial was unnecessary to the determination of the issue raised by the Government's petition for a writ of certiorari, that portion of the record was not printed. In these circumstances, we suggest that, if this Court reverses the judgment below insofar as it relates to the statute of limitations, the cause be remanded to the Court of Appeals for determination of the other contentions raised by respondents.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 250640 1471

19

Office Supreme Court, U.S.
FILED
MAY 2 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. 527

UNITED STATES OF AMERICA,

Petitioner,

—v.—

STANLEY KLINGER, WILLIAM CANTOR, and MORRIS SANDLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

LOUIS BENDER
Attorney for Respondents
165 Broadway
New York, N. Y.

INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	3
Summary of Argument	5
ARGUMENT:	
The crime charged in the indictment is barred by the Statute of Limitations	9
A. Under the Suspension Act the three year period of limitations began the day after the termination of hostilities on December 31, 1946	10
B. The Suspension Act is not applicable to the offense charged in this indictment	29
C. The Suspension Act was expressly repealed by the Act of June 25, 1948 and was not preserved by either the savings clause in Section 21 of that Act, or the general savings clause, Section 109, Title 1, U. S. C., so as to apply to the indictment in this case	37

CITATIONS:

PAGE

Cases:

Bauserman v. Blunt, 147 U. S. 647 21
Bridges v. U. S., 199 F. 2 811, 9th Cir., pending before this Court, No. 548 35

Church of the Holy Trinity v. U. S., 143 U. S. 457 24

De La Rama S. S. Co. v. U. S., 344 U. S. 386 40

In re Doyle, 42 F. 2 686, S. D. N. Y., rev'd on other matters U. S. v. Doyle, 47 F. 2 1086 36

Falter v. U. S., 23 F. 2 420, cert. den. 277 U. S. 590 32
Fiswick v. U. S., 329 U. S. 211 9

Haas v. Henkel, 216 U. S. 462 ..... 31, 32, 35
Hammerschmidt v. U. S., 265 U. S. 182 ..... 7, 35

Knowlton v. Moore, 178 U. S. 41 24

Langes v. Green, 282 U. S. 531 29
LeTulle v. Scofield, 308 U. S. 415 29

Maryland v. B. & O. R. Co., 3 How. 534 38
Marzani v. U. S., 168 F. 2 133, U. S. App. D. C., affirmed by a divided court in 335 U. S. 895 ..... 7, 34
Miller v. U. S., 24 F. 2 353, cert. den. 276 U. S. 638 .... 32, 33

Nathan v. Equitable Trust Co., 250 N. Y. 250 21

Oklahoma v. Civil Service Commission, 330 U. S. 127 29

PAGE

Vermilya-Brown v. Connell, 335 U. S. 377 ..... 21, 22, 25

Yeaton v. U. S., 5 Cranch 281 38

U. S. v. Ausmeier, 152 F. 2 349, 2d Cir. 35
U. S. v. Beacon Brass Co., 344 U. S. 43 ..... 7, 28
U. S. v. Bryan, 339 U. S. 323 ..... 21, 25
U. S. v. Chambers, 291 U. S. 217 ..... 8, 38
U. S. v. C. I. O., 335 U. S. 106 ..... 21, 25
U. S. v. Clavere et al. (2 cases), U. S. D. C., N. D. Calif., opinion not officially reported, cert. granted by this Court and case now pending on the docket, Nos. 635, 636 ..... 6, 28
U. S. v. Cohen, 270 U. S. 339 ..... 7, 31
U. S. v. Eliopoulos, 45 F. S. 777, 781, D. C. N. J., 1942 20
U. S. v. Gilliland, 312 U. S. 86 ..... 7, 35
U. S. v. Gottfried, 165 F. 2 360, cert. den. 333 U. S. 860 ..... 32, 36
U. S. v. Keitel, 211 U. S. 370 31
U. S. v. McElvain, 272 U. S. 633 ..... 7, 33, 34
U. S. v. Obermeier, 186 F. 2 243 (2 C.) cert. den. 340 U. S. 951 ..... 8, 34, 36, 38, 39, 40
U. S. v. Scharton, 285 U. S. 518 ..... 7, 20
U. S. v. Smith, 342 U. S. 225 ..... 5, 10, 11, 14, 15, 22, 25, 27, 37, 40
U. S. v. Witherspoon, 110 F. S. 364, U. S. D. C., E. D. Tenn. February 2, 1953 ..... 6, 16, 23, 28

Statutes:

28 U. S. C. A. §1254(1) 2

Rules 37(b)(2) and 45(a), Fed. Rules Cr. Pro. 2

PAGE

War Time Suspension of Limitations Act of 1942 as amended in 1944 ..... 2, 9-36, 37-41
War Time Suspension of Limitations Act of 1942 ..... 2, 10, 12, 23, 29, 30, 31, 34

Contract Settlement Act of 1944 ..... 9, 10, 12, 14, 15, 16

Surplus Property Act of 1944 ..... 2, 14, 16, 24

§21 of Act of June 25, 1948 ..... 2, 10, 37-41

§109, Title 1, U. S. C. 2, 10, 37-41

§37, Criminal Code 5, 29-36

§3287, Title 18, U. S. C. 37, 38
§3282, Title 18, U. S. C. 9, 28
§§1-370, Title 18, U. S. C. p. 275 38

Act of Nov. 17, 1921 ..... 10, 13, 14, 29, 30, 32, 34

Miscellaneous:

H. Rep. 2051, 77th Cong., 2d Sess. 10, 30, 31
H. Rep. 2498, 81st Cong., 1st Sess. 26
H. Rep. 365, 67th Cong. 30

S. Rep. 1544, 77th Cong., 2d Sess. 10, 23, 30, 31
S. Rep. 1057, 78th Cong., 2d Sess. 13, 23-24

Statement of the House Managers (H. Rep. 1708, 78th Cong., 2d Sess.) 13
Statement of Alexander Holtzoff, etc. 10

PAGE

Letter from Attorney General Francis Biddle, etc..... 11
Letter from Secretary of War Stimson, etc. 11

Congressional Debates (88th Cong. Rec. 4759) 11
Congressional Debates on H. Rep. 8298, 67th Cong., 1st Sess., 61 Cong. Rec. 7060-7061, 7064, 69 Cong. Rec. 842 30

Statement of Sen. Mahoney, Committee on Military Affairs, S. Rep. 321, 79th Cong., 1st Sess., May 31, 1945 15

Webster's New International Dictionary, 2d Ed., 1934 23

Uniform Code of Military Justice 26

IN THE

Supreme Court of the United States

October Term, 1952

No. 527

UNITED STATES OF AMERICA,

Petitioner,

—v.—

STANLEY KLINGER, WILLIAM CANTOR, and MORRIS SANDLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinion Below

The opinion of the Court of Appeals (R. 16-31) is reported at 199 F. 2d 645.

Jurisdiction

The judgment of the Court of Appeals was entered on November 3 1952 (R. 21). On November 28, 1952, by order of Mr. Justice Jackson, the time within which to file the petition for a writ of certiorari was extended to and including January 2, 1953. The petition was filed on December 31, 1952, and was granted on April 6, 1953 (R. 25).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

Questions Presented

1. Whether, under the War Time Suspension of Limitations Act of 1942, as amended in 1944, the three year period of limitations, applicable to this crime, began to run on January 1, 1947 after the official termination of hostilities (December 31, 1946) or on January 1, 1950, three years thereafter.

2. Whether the War Time Suspension of Limitations Act is only applicable to a "defrauding" of the United States in the usual and primary sense of the word "defrauding," namely "cheating the Government out of property or money."

3. Whether the War Time Suspension of Limitations Act of 1942, as amended in 1944, repealed in 1948, was preserved by the savings clause, Sec. 21 of the Act of June 25, 1948, c. 645, 62 Stat. 802, or the general savings clause, Sec. 109, Title 1 U. S. C. (formerly R. S. Section 13), so as to apply to the indictment in this case.

Statute Involved

Section 1 of the Suspension Act of August 24, 1942, as amended by Section 28 of the Surplus Property Act of October 3, 1944 (c. 479, 58 Stat. 765, 781; 18 U. S. C. (1946 ed.) 590a), provided:

> "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) com-

mitted in connection with the negotiation, procurement, aware, performance, payment for, interim financing, cancellation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of World War II, or with any disposition or termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1614, 1615-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in World War II as proclaimed by the President or by a concurrent resolution of the Two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses or transactions which are already barred by provisions of existing law."

Statement

The respondents were indicted on March 31, 1950 under a single count of conspiracy beginning on or about January 1, 1946 and continuing thereafter up to and including the date of the filing of the indictment, as aforesaid, to defraud the United States in the exercise of its sugar rationing program, free from dishonesty, fraud and corruption of its administering officers (R. 2-8).*

The indictment further alleged that respondents Klinger and Cantor were investigators in the Food Section of the Enforcement Division of the Office of Price Administration, and that at the direction of the respondents, named

* References to "R." indicate record printed by petitioner. References to "C. A. R." indicate Court of Appeals Record on file in this Court.

co-conspirator grocers were to set up sugar ration accounts, overdraw their allotment, and sell the sugar thus obtained on the black market at prices in excess of the maximum selling price. In pursuance of this conspiracy, the indictment went on, the respondents Klinger and Cantor, who were employees of the Office of Price Administration, would merely recommend suspension of the co-conspirators from further dealings in sugar and would not refer their cases for criminal prosecution. The indictment, except for naming the respondent Sandler as a defendant, is silent as to the part he played. He is mentioned in three overt acts, in two of which he received checks from a co-conspirator, and in the third $1,000.00 in currency. The respondent Morris Sandler operated, together with a partner, the Quaker Sugar Company. He was not an O. P. A. agent as recited in the Government's brief (p. 2). There was no evidence that he knew or ever met any of the other defendant O. P. A. agents. Respondent Sandler merely sold sugar to the co-conspirator grocers, gave correct invoices with the correct names of the purchasers on them, and received in return ration currency for the sugar sold (C. A. R. 1126, 1182-1184). The co-conspirators destroyed their records concerning these transactions, but respondent Sandler retained all his invoices and cancelled checks which were voluntarily turned over to the Department of Justice in December, 1946 or April, 1947, during the investigation then being conducted by the Department of Justice (C. A. R. 471, 2035). From 1947 on, when the Office of Price Administration case records were being destroyed by the Bureau of National Archives, the Department of Justice preserved only those portions of the case records of the respondents Klinger and Cantor pertaining to the co-conspirator grocers who testified for the Government, which it felt necessary for its prosecution of the instant case, but failed to

preserve all of the records material to the issues in this case (C. A. R. 1603-1604, 2017). Such records which may have been exculpatory, explanatory or contradictory of the Government's case were destroyed and not available to respondents Klinger and Cantor (C. A. R. 1604, 2013).

Summary of Argument

A. The charge of conspiracy to defraud under Section 37 of the Criminal Code was complete in December, 1946, prior to the official termination of hostilities, December 31, 1946. Assuming that the Suspension Act of 1942 as amended in 1944 (18 U. S. C., 1946 Ed., 590a) applied to this offense, the indictment was barred since the Suspension Act suspended the "bar" of the three year statute of limitations until December 31, 1949, or three years after the termination of hostilities. This construction of the Suspension Act by the Second Circuit below preserved the original purpose of the 1942 Suspension Act to extend existing limitations periods only by the time elapsing before the termination of hostilities. Further, the construction advanced by the Government would, as to frauds committed prior to the termination of hostilities, enlarge the period of prosecution beyond the limit which Congress would have conceivably tolerated. This interpretation of the Suspension Act is in accord with the opinion of this Court in *U. S.* v. *Smith*, 342 U. S. 225, wherein it was stated that no reasons of policy are suggested for straining the language of the Suspension Act beyond the emergency which made the suspension seem advisable. To hold otherwise would place Congress in the absurd position of providing in the Suspension Act that the three year statute of limitations begins to run on January 1, 1947 for crimes committed after hostilities, and for crimes committed between August, 1942 and December 31, 1946, the

Government shall have all that time plus double the normal three year period. Such an incongruous result should not be attributed to a Congressional enactment, particularly where it was not intended. Moreover, Congress could not have intended to suspend the limitations period for six years after hostilities when in the same Acts, amending the 1942 Act, *viz.* Contract Settlement Act of 1944 and Surplus Property Act of 1944, it only required records of war contractors to be kept for five years. The five year period of limitation for civil suits by the Government under these Acts coincided with the period of keeping of records. Congress would have provided a like period for the keeping of records if it had intended to provide the Government with six years after cessation of hostilities to prosecute.

The contention of the Government is contrary to well established rulings of this Court that statutes of limitation are statutes of "repose" and are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the Government to explode after witnesses and proofs necessary for the protection of the accused have passed beyond availability. The facts in this case well illustrate the soundness of these principles where essential records of the respondents Klinger and Cantor were destroyed by the Bureau of National Archives after the Office of Price Administration ceased its existence. Records which may very well have been exculpatory and probative of innocence were unavailable to them.

The reasoning of the Court below affords the Government ample leeway in the investigation and prosecution of war frauds, balanced by a judicious regard for the interests of persons accused of crime. Its decision was followed in *U. S.* v. *Witherspoon,* 110, F. S. 364, U. S. D. C., E. D. Tenn., February 2, 1953; *U. S.* v. *Clavere et al.* (2

cases), U. S. D. C., N. D. Calif., opinion not officially reported, cert. granted by this Court and case now pending on the docket, Nos. 635, 636; cf. *U. S.* v. *Beacon Brass Co.*, 344 U. S. 43.

B. Under an interpretation of the 1921 Act, concededly the model for the Suspension Acts, this Court twice rejected the Government's contention that a "defrauding," in the secondary sense, that is, of obstructing the lawful operations of the Government by dishonest means constituted a "defrauding" within the meaning of that Act. *U. S.* v. *McElvain*, 272 U. S. 633; *U. S.* v. *Scharton*, 285 U. S. 518.

The *McElvain* case flatly held that the 1921 Act only applied to a special class of cases, to wit, substantive crimes involving fraud as an element of the crime, or conspiracy to commit them. The Congressional history of the 1921 Act and the Suspension Acts clearly reveals that Congress was primarily interested in reaching out of pocket war frauds. In this respect, Congress used the word "defrauding" in its primary sense of cheating the Government out of property or money. *U. S.* v. *Cohen*, 270 U. S. 339. Thus, in *Marzani* v. *U. S.*, 168 F. 2 133, U. S. App. D. C. affirmed by a divided court in 335 U. S. 895, it was expressly held that the Suspension Act only applied to crimes where pecuniary fraud was an essential ingredient of the crime under the statute creating the offense. A conspiracy to defraud, as charged here, will lie under Section 37 without any proof of pecuniary or property fraud. *U. S.* v. *Gilliland*, 312 U. S. 86; *Hammerschmidt* v. *U. S.*, 265 U. S. 182. Pecuniary fraud is thus, not an essential ingredient of a conspiracy to defraud under Section 37. Consequently the Suspension Act is inapplicable to the indictment in this case to prevent the bar of the statute of limitations.

C. The Suspension Act of 1942, as amended in 1944, was repealed by the Act of June 25, 1948, which revised the Criminal Code. It was reenacted as Section 3287, Title 18 U. S. C. in permanent form to be applied "whenever the U. S. is at war." The Reviser's note following §3287, Title 18, U. S. C., indicates quite clearly that the new section applied to future wars, and not World War II. Consequently, repeal of the Suspension Act without an effective savings provision constituted a legislative pardon or amnesty. *United States* v. *Chambers*, 291 U. S. 217, 223.

Neither Section 21 of the Act of June 25, 1948 which preserved "any rights or liabilities" under the repealed statutes, nor the General Savings clause, Section 109 Title 1, U. S. C., succeeded in saving the repealed Suspension Act so as to apply to the indictment in this case. *U. S.* v. *Obermeier*, 186 F. 2 243 (2 C.) cert den. 340 U. S. 951. In an able and exhaustive analysis of the legislative history and prior adjudications of this Court, the Second Circuit Court in the *Obermeier* case (*supra*), concluded that Section 21 of the 1948 Act and Section 109 of Title 1, U. S. C. save merely substantive "rights" and "liabilities' but do not save limitation statutes. Consequently, the Suspension Act is inapplicable to prevent the bar of the statute of limitations from applying. For these reasons, the judgment below should be affirmed.

ARGUMENT

I

The crime charged in the indictment is barred by the Statute of Limitations.

The indictment charged a conspiracy from about January 1, 1946 to the time it was filed on March 31, 1950. Neither the overt acts charged, however, extended beyond December, 1946 (Government's brief p. 3), nor was there proof of any other overt act beyond December 27, 1946 (C. A. R. 1047). As the Court below stated (R. 16):

> "* * * the prosecution did not prove that the conspiracy lasted beyond December 31, 1946; * * *"

The three year Statute of Limitations applicable to this crime (Section 3282, Title 18) normally began to run from the date of the last overt act, presumably December 27, 1946. *Fiswick* v. *U. S.*, 329 U. S. 211. Since more than three years elapsed between the last overt act and the filing of the indictment, the crime was barred unless, as maintained by the Government, the three year Statute of Limitations was extended by the War Time Suspension of Limitations Statute.

The Court below assumed, as did the Government then, and now, that the crime charged was of a type included under the War Time Suspension of Limitations Act, and that the applicable Suspension Act was the Act of August 24, 1942, as amended by the Surplus Property Act of 1944, 58 Stat. 765, 781, 18 U. S. C. (1946 Ed.), Section 590a, now in permanent form in 18 U. S. C., Section 3287.

Based upon its finding of what the legislature intended in enacting the Statute and the opinion of this Court in

U. S. v. *Smith*, 342 U. S. 225, the Court below held, that the three year Statute of Limitations applicable to this crime began to run the day after the termination of hostilities, to wit, December 31, 1946; so that, the indictment was barred since more than three years had elapsed between that date and the filing of the indictment.

It is respectfully submitted that the judgment of the Court below is correct and should be affirmed on the following grounds:

(a) Its interpretation of the Suspension Act is in full accord with the purposes of the Act and the circumstances under which the challenged words were employed;

(b) The Suspension Act is not applicable to the offense charged in this indictment; and

(c) The Suspension Act was expressly repealed by the Act of June 25, 1948 and was not preserved by either the savings clause contained in Section 21 of that Act or the general savings clause, Section 109, Title 1, U. S. C., so as to apply to the indictment in this case.

A. *Under the Suspension Act the three year period of limitations began the day after the termination of hostilities on December 31, 1946.*

The Suspension Act was first enacted on August 24, 1942, c. 555 Section 1, 56 Stat. 747. It is derived from the Act of November 17, 1921, c. 124, 42 Stat. 220, which enlarged the Statute of Limitations to a period of six years in respect to offenses involving frauds against the Government (H. R. 2051, 77th Congress, 2d Sess.; S. R. 1544, 77th Congress, 2d Sess.; Statement of Alexander Holtzoff,

Special Assistant to the Attorney General, in hearings before the Subcommittee of the Committee on the Judiciary of the House of Representatives, 77th Congress, 1st Sess., p. 6 thereof on H. R. 4916; Letter from Attorney General Francis Biddle to Congressman Sumners, Chairman of the Committee on the Judiciary, dated November 29, 1941 appended to the transcript of the aforesaid hearings at page 8 thereof).

It would seem clear from these reports and from the Congressional debates (88th Cong. Rec. 4759) that Congress intended to suspend the normal three year Statute of Limitations during actual hostilities so that, " • • • offenses occurring prior to the termination of hostilities shall not be allowed legally to be forgotten in the rush of the war activities. That is the gist of the Reports." *U. S.* v. *Smith,* 342 U. S. 225, 261.

If actual hostilities had terminated prior to June 30, 1945, the suspension of the Statute of Limitations would have been lifted to coincide with the termination date. That would seem evident from the proviso in the 1942 Act, " • • • shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate."

It would likewise seem to follow from what was said in a letter from Secretary of War Stimson, Acting Secretary of Navy Forrestal, and Acting Attorney General Charles Fahey, to the Chairman of the Senate Judiciary Committee (appended to S. R. 1592, 77th Congress, 2d Sess.) which contemplated the enactment of the Suspension Statute to antitrust offenses (latter passed October 10, 1942, 56 Stat. 781):

> "In instances where anti-trust investigations, prosecutions or suits are postponed, as contemplated by the above mentioned letter, it is advisable and in some in-

stances essential, that the running of the Statute of Limitations be suspended during the periods of postponement (of investigations interfering with the production of war material). Such postponement will be during periods expiring not later than the end of the present war. The proposed bill will accomplish the suspension of the running of the Statute of Limitations applicable to anti-trust cases until June 30, 1945 or the earlier date specified therein." (Parenthesis supplied.)

The Suspension Act referred to was identical to the Suspension Act in the instant case.

Approximately two years later Congress amended the 1942 Suspension Act in the Contract Settlement Act of 1944 and again in the Surplus Property Act of 1944, by providing that the normal three year Statute of Limitations shall be suspended, " • • • until three years after the termination of hostilities as proclaimed by the President or by the concurrent resolution of Congress":, and further, adding two additional clauses of types of offenses pertaining to disposal of surplus property and contract termination. .

It is this amendment upon which the Government relies for its position that the present indictment is not barred. The Government contends here, as it did below (Govt's. brief in the Court of Appeals, p. 10), that:

"Thus, until December 31, 1949, there was no Statute of Limitations for the applicable crimes, but on January 1, 1950, all limitations periods began to run their normal course." (Govt's. brief, p. 9);

or as it otherwise stated (*ibid*):

"The beginning of the period of suspension is August 24, 1942, when the Act was originally passed, and the

terminal date is 'three years after the termination of hostilities in the present war,' i.e., December 31, 1949."

The Government would thus have the Suspension Act interpreted in such a way as to impute to Congress an intent to give it from August 24, 1942 to December 31, 1949, or a period of seven and one-half years when the Statute of Limitations was to be inoperative, and an additional three years from December 31, 1949, *i.e.*, until December 31, 1952, at which time the crime would be barred. This interpretation would afford the Government ten and one-half years before the bar of the Statute would apply. It would also extend the bar of the Statute six years after the termination of hostilities and some seven and one-quarter years after V-J day on September 2, 1945. Significant in this regard is that the Government's claim imputes to Congress an intention to give it four and one-half years more than the six years provided in the 1921 Act, which, concededly, was the model for the 1942 Act.

Whether Congress ever intended to extend the bar of the Statute as the Government claims is the question. If it did so intend, obviously it was doing what it never did or intended in its enactment of the 1942 Act and the October, 1942 Act as to anti-trust suits.

The Circuit Court below could not find any such Congressional intention in the legislative history of the 1944 Acts to support the Government's position (R. 20). There is nothing to that effect in the official report of the Statement of the House Managers (H. R. 1708, 78th Congress, 2d Sess.), and as the Court below indicated:

"However, if Congress had so changed its mind, the Senate report which appended the bill gave no such indication, * * *" (S. R. 1057, 78th Congress, 2d Sess.)

If Congress had intended to extend the bar of this Statute six more years from the termination of hostilities, it would have been a simple matter to do so. Nowhere in the official reports of the House and Senate Committee does it appear that Congress in passing the 1944 Acts intended to do more than suspend the three years Statute of Limitations during the period of hostilities as it had done in the 1942 Act.

The claim that the two later amendments to the Suspension Act were passed during the latter part of the war when Congress was looking toward post-hostilities problems and re-conversion (Government's pet. for cert. p. 10) is not a basis for imputing to Congress an intention to extend the Suspension Act as the Government asserts.

The termination of hostilities occurred more than sixteen months after the shooting war stopped. In addition, as stated by Mr. Justice Clark in his concurring opinion in *U. S.* v. *Smith*, 342 U. S. 225, 230:

> "Immediately after V-J Day all war procurement stopped, contracts were canceled, and renegotiation was speeded up. The President did not proclaim the cessation of hostilities until December 31, 1946, sixteen months after the fighting ceased. *During this period, the pressing problems of demobilization and reconversion—problems likely to cause the continued perpetration of frauds on the Government—were for the most part brought to an end.*" (Emphasis supplied.)

Authority for such a statement can be seen from the fact that Mr. Justice Clark was Attorney General of the United States at that time and in the best position to know. Moreover, the Contract Settlement Act of 1944 and the Surplus Property Act of 1944 were introduced and enacted because Congress was convinced that preparation for the transition

from war to peace should be undertaken well in advance of the end of hostilities. (Statement of Sen. Mahoney, Committee on Military Affairs. S. R. 321, 79th Congress, 1st Sess., May 31, 1945.) In that report, "Investigating Disposal of Surplus Government Property and Related Problems," Senator Mahoney, at page 2 thereof, indicates that as of March 31, 1945, the Government had terminated 27½ billion dollars' worth of contracts and settled, already by that date, 18 billion of that amount.

The Government, incidentally, made the same argument in *U. S.* v. *Smith*, 342 U. S. 225, which was rejected by this Court, at pages 227-228.

A further indication that Congress did not intend to extend the Suspension Act six years from the termination of hostilities is Section 19(a) of the Contract Settlement Act of 1944 which made it a crime to secrete or destroy records relating to the identical subject matters contained in the second and third clauses of the Suspension Act, "* * * until * * * (3) five years after the termination of hostilities in the present war."

To arm the Department of Justice with a power to indict at any time within six years after the termination of hostilities, as is contended by the Government here, Congress would certainly have required those who dealt with the Government, and against whom it was its purpose in suspending the Limitations Statute, to keep its records for an equal length of time. Any other conclusion would lead to an absurd result since any prosecutor knows that the right to examine and obtain such records is essential to any possible prosecution. That is exactly what happened in the instant case when the Government obtained the respondent Sandler's records (C. A. R. 471, 2035). Congress, in the same Act, would not have provided a six year

limitation after hostilities to prosecute for war crimes and only a five year requirement after hostilities for war contractors to preserve their records. (This provision was repealed by the Act of June 25, 1948 and reenacted as Section 443, Title 18 U. S. C., except that the word "until" was deleted and the words "before lapse of" substituted [Reviser's Note to Section 443, Title 18 U. S. C.].)

This contention finds ample support in the fact that the five year provision for the keeping of records (19(a) *supra*) coincided with the five year provision of limitations for the bringing by the United States of any action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, provided for both in the Contract Settlement Act of 1944 (§19c, §119, Title 41 U. S. C.) and the Surplus Property Act of 1944 (repealed June 30, 1949, 63 Stat. 399, reenacted Section 489, Title 40 U. S. C., eff. July 1, 1949).

Indeed, if the limitation period for civil suits under the Contract Settlement Act of 1944 and the Surplus Property Act of 1944, which, incidentally, are predicated upon actions of "fraud" and "defrauding," are within the scope of the Suspension Act, so held in *U. S.* v. *Witherspoon*, 110 F. S. 364, D. C. E. D. Tenn. 1953, the Government, as it contends, would have eleven years from the termination of hostilities to bring such a suit, or fifteen and one-half years from August, 1942, an incredible length of time in view of the absence of any expressed intention by the Congress to accomplish such a result.

A further illustration of the weakness of the Government's position as to the need for greater time can be found in the history of the instant case. The conspiracy was apparently hatched in February, 1946, some six months after V-J day. Before it was even completed, in November of 1946 the Department of Justice was already investigat-

ing it (C. A. R. 1005). The statements of its co-conspirator witnesses who testified at the trial were obtained in December, 1946 (C. A. R. 798). The records of the respondent Sandler, essential to the prosecution, were voluntarily turned over to the Department of Justice in December, 1946, or April, 1947 (C. A. R. 471, 2035). The respondents were arrested April 30, 1947. Certainly, the failure to indict until March 31, 1950, was not due to its inability to proceed as a result of the pressing problems of the war. The Government delayed this case for reasons best known to it, but apparently quite apart from the reasons it urges as a basis for its construction of the Suspension Act.

But in delaying the prosecution in the instant case, the Department of Justice points up the grave injustices that result from a liberal extension of the Suspension Act. I mention this because in determining the legislative intention of that Statute, this Court should not overlook its effect on the case at hand.

An essential part of the Government's case below dealt with the scheme whereby respondents Klinger and Cantor would advise co-conspirators Morgenbesser, Allan Shapiro and Isidore Shapiro to apply for sugar allotments, would then cover up their violations, and thereafter suspend them rather than recommend criminal prosecution (R. 2-8).

From time to time during the trial, counsel for the respondents requested the Government to produce the actual O. P. A. files of these co-conspirators, not only to test the accuracy of their testimony (as for example C. A. R. 100), but more importantly because the respondents regarded such documents contained in those files essential to their defense and to their innocence.

The Trial Court below took the position that these respondents were entitled to this material (C. A. R. 1068,

1069). The Trial Court took the further position that respondents Klinger and Cantor were entitled to records *in other cases* which might indicate that they had properly fulfilled their duties in all respects (C. A. R. 1682). Respondents had demanded such records (C. A. R. 1679-1688). Counsel for the Government below admitted he did not have any such records which pertained to these cases except for such Government exhibits which he offered in evidence. As to the records demanded by respondents Klinger and Cantor which had to do with cases other than the one at trial, counsel for the Government claimed they were immaterial (C. A. R. 1682).

In a colloquy between Court and counsel (C. A. R. 1601-1605), it appeared that unless the Department of Justice had subpoenaed the ration files of all these grocers (co-conspirators) or others with whom the respondents Klinger and Cantor had anything to do, the probability is that they were destroyed pursuant to an Act of Congress. In this colloquy, counsel for the Government below admitted that he had never subpoenaed the entire ration files of these co-conspirators who testified and that as far as he knew, no investigative agency that had anything to do with this case was asked to preserve any O. P. A. records other than the ones he offered in evidence (C. A. R. 1603-1604). Counsel for the Government stated further that he didn't believe that the Alcohol Tax Unit, the agency which took over the O. P. A. records for this prosecution, had any of the records or documents sought by the respondents Klinger and Cantor (C. A. R. 1069). The Court below indicated that the evidence is that such records sought by respondents Klinger and Cantor have been destroyed (C. A. R. 1604).

Upon the failure of the Government to produce the pertinent records sought by respondents Klinger and Can-

tor, a subpoena was served upon Wayne C. Grover, Head of the National Archives, Industrial Records Branch of the United States Government, seeking the production of any and all of such records which pertained to the ration files of the co-conspirators in this case, including inves .- gative reports in that connection, as well as other cases, of the respondents Klinger and Cantor (Exhibit Greif LL). A representative of that Agency, Victor Gondos, appeared and testified for the defense (C. A. R. 1991, etc.). Dr. Gondos testified that pursuant to an Act of Congress, O. P. A. records were destroyed except for those records which the Government or any of its agencies wanted to preserve (C. A. R. 1999). Dr. Gondos testified that there is nothing in the files of the National Archives that was contained in the subpoena (C. A. R. 2002). The Court below picked at random certain of the requests in the aforesaid subpoena and asked Dr. Gondos whether or not he specifically looked for such documents and what his answer was (C. A. R. 2005-2006). Upon the constant objection of counsel for the Government below as to whether or not Dr. Gondos could testify that these records sought for in the subpoena ever existed, including the daily activity reports of respondents Klinger and Cantor, Dr. Gondos was asked the following question (C. A. R. 2013):

> "Q. Do you know whether any of these things were ever in being? A. I have reason to believe they were in being at one time."

The questions and answers continue in the record, pages 2014, etc.

During the investigation which apparently began in December of 1946 and continued on in 1947 and probably later, the Government had the opportunity to preserve all of these records which were not only material to the prose-

cution of this action, but also which would be admissible as either exculpatory, or explanatory, or contradictory of the prosecution's case, or at least relevant to the issues of the instant case. This the Government admits it failed to do.

Fundamentally, Statutes of Limitation have been liberally interpreted in favor of repose. As this Court has previously stated in *U. S.* v. *Scharton*, 285 U. S. 518, 522, apropos the six year Statute of Limitations provided in the 1921 Act:

> "And as the section has to do with statutory crimes, it is to be liberally interpreted in favor of repose and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses. (Cases cited.)"

Basically this is so because, as stated by the Court in *U. S.* v. *Eliopoulos*, 45 F. S. 777, 781, D. C. N. J., 1942:

> "Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability."

Thus the undue extension of the limitations period can have particularly harsh effects upon the rights of persons accused of crime. The destruction of the records in this case is merely an illustration of what may have occurred to the multitude of records of other extinct government agencies. It is an added, but significant, objection to more than doubling the statute of limitations after hostilities ended.

The Government seeks to justify its position mainly in reliance upon a literal interpretation of the words used in the Suspension Statute. To support its interpretation of what Congress meant in enacting the Suspension Act, it cites a series of civil war cases to prove that the words "the running of the suspension of limitations" means literally, "* * * counting out or tolling from the period of limitations the period of suspension" (Govt.'s brief, pp. 10-11). However, these decisions do not involve the construction of the terms of a statute of limitation, but rather, as pointed out by this Court in *Bauserman* v. *Blunt*, 147 U. S. 647, 654, as implying an exception by reason of the effect of a state of war based upon public and international law. Our concern here is with the legislative intent to be derived from the express terms of a statute. Cf. *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, 253; *Vermilya-Brown* v. *Connell*, 335 U. S. 377, 386-387.

Whether the word "running" means literally what the Government claims or whether it is interpreted as meaning "having run" is immaterial, in the abstract, unless such definition accords with the legislative intention; for, it has been held on many occasions by this Court that the meaning intended by the legislature should prevail even though it might be contrary to common usage or to technical construction. (See, *e.g.*, *U. S.* v. *Bryan*, 339 U. S. 323, 335, where the Court states:

> "Admittedly her testimony relative to production of the books comes within the literal language of the statute; but the trial court thought that to apply the statute to respondent's testimony would subvert the Congressional purpose in its passage. We agree.";

and as Mr. Justice Reed said for this Court in *U. S.* v. *C. I. O.*, 335 U. S. 106, 112:

> "Expenditure as here used is not a word of art. It has no definitely defined meaning and the applicability of the word must be determined from the circumstances surrounding its employment."

Thus, as this Court has indicated, words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the Congress, and that their meaning in particular instances are to be arrived at not only by a construction of the words themselves, but by considering as well the context and purposes of the law and the circumstances under which the words were employed. *Vermilya-Brown* v. *Connell*, 335 U. S. 377, 386.

The Court below held that the Suspension Act operated to suspend "the bar" of the limitations statute, not its "running" in a literal sense. This conclusion, Judge Learned Hand observed, preserved the original purpose of the 1942 Act to extend existing limitation periods only by the time elapsing before the termination of hostilities and upon the further ground that the interpretation urged by the Government would, as to frauds committed prior to the termination of hostilities, enlarge the period to prosecute beyond the limit which Congress would have conceivably tolerated.

It was exactly what was said by Mr. Justice Douglas in *U. S.* v. *Smith*, 342 U. S. 225:

> "No reasons of policy are suggested for straining the language of the Act to suspend the running of the statute beyond the emergency which made the suspension seem advisable."

Thus, as interpreted by this Court in *U. S.* v. *Smith* and by the Court below, the word "running" was apparently

intended by Congress in the 1944 Act to denote the past tense as when we say "the statute has run" against an offense. The grammatical form of the present participle when used as a noun may at first suggest a present running rather than a "having run." (See *U. S. v. Witherspoon*, 110 F. S. 364, 366 D. C. E. D. Tenn. 1953 (where the Court poses the question, "Does the Suspension Act mean what it would seem at first glance to mean, namely that the running * * * shall be suspended until three years after * * * hostilities.")), but actually such grammatical form, in every day usage, denotes as often and perhaps more often, a past rather than a present act or state. Accordingly, when Congress provided in colloquial terms for the suspension of the "running" of the applicable limitations statute, the reference most likely was to statutes "having run" rather than to the "statute's present running." In other words, what Congress suspended was not the running of the statutory time but the expiration. (See Webster's New International Dictionary, 2d Ed., 1934, where "suspend" is defined to include "to set aside or to make temporarily ineffective, or to 'postpone.' ")

The Committee reports clearly support this position. In enacting the Suspension Act, Congress was concerned primarily with offenses subject to the general three year limitations period. (See S. R. 1544, 77th Cong., 2d Sess., pp. 1-2.) Congress wanted to insure that war time frauds could be discovered and punished "even after the termination of the present conflict" (S. R. 1544, 77th Cong., 2d Sess., pp. 1-2). The history of the 1944 amendment supports the same view. Congress realized that the bulk of the offenses under the Suspension Statute would not be apprehended or investigated until the end of the war and that a reasonable period, to wit, three years would be required to permit such offenses to be prosecuted (S. R.

1057, 78th Cong., 2d Sess., p. 14). Accordingly, with regard to offenses committed prior to the termination of hostilities, the Suspension Act operated to give the Government a limitation period equal to the normal three years plus whatever time had elapsed between the commission of the offense and the termination of hostilities; and for offenses committed after hostilities, the statute began to run on the day after.

This construction provides adequate leeway for investigation and prosecuition by the Government, and is balanced by reasonable regard for the rights of persons charged with crime.

A statute should be given a rational, logical and sensible interpretation (*Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457), and wherever possible the courts should strive to avoid a construction which would make the statute unjust and unreasonable (*Knowlton* v. *Moore*, 178 U. S. 41).

The interpretation of the Suspension Act below and by this Court in *U. S.* v. *Smith*, *supra*, results in an equitable, just, and reasonable operation of that Act, entirely adequate for the purposes intended. The contention of the Government would impute to Congress a construction which would render the Suspension Act incongruous and unjust. Such it would be, if Congress could be said to have provided in the 1944 Acts a six year limitation after termination of hostilities for the prosecution of covered offenses (Suspension Act), and only five years for the keeping of records, as well as only five years for the prosecution of civil offenses under those Acts and, further, if Congress intended by the Suspension Act to apply the three year statute to a crime committed on January 1, 1947, and for crimes committed between August, 1942 and December 31, 1946 allow all that time plus twice the period for crimes committed after hostilities.

The Government claims there is no incongruity in holding, as it contends, for crimes committed between August, 1942, and December 31, 1946, and allowing only three years for crimes committed after December 31, 1946 (Govt.'s brief, p. 20). Yet, it is more than significant that the position it took in its brief in *U. S.* v. *Smith* is directly opposite to the position it now takes (Govt.'s brief in *U. S.* v. *Smith, supra,* p. 20). In the *Smith* case, *supra,* the Government urged the caveat that to hold as this Court finally did as to offenses committed after termination of hostilities would cause the operation of the Suspension Act on crimes committed between August, 1942 and December 31, 1946 to lead to incongruous results. However only the interpretation claimed by the Government would lead to incongruous results. This Court should strive to avoid any construction of the Suspension Act which would place the Congress in such an unintended position.

This Court on numerous occasions has interpreted words in a Congressional enactment in such a manner as to avoid the imputation that Congress could or would intend an unjust statute, with absurd results. See *U. S.* v. *C. I. O.*, 335 U. S. 106, 112, where Mr. Justice Reed, speaking for this Court, construed the word "expenditure" as not a "word of art"; and *U. S.* v. *Bryan*, 339 U. S. 323, 335, where Chief Justice Vinson, speaking for this Court, construed the words "in any criminal proceeding" other than in a literal sense; and *Vermilya-Brown* v. *Connell*, 335 U. S. 377, where Mr. Justice Reed speaking for this Court, stated that this Court was not aided in determining what Congress intended in its use of the word "possession" by the meaning of that word as used in a number of other statutes (at pp. 386-387).

We cannot accept the Government's contention "that at all times when the War Time Suspension of Limitations

Act was under Congressional consideration, a literal interpretation was given its language" (Govt.'s brief, p. 18). As authority for this statement, the Government refers to the hearings before the Subcommittee of the Committee on Armed Services of the House on H. R. 2498, 81st Congress, 1st Session, pertaining to the adoption of the Suspension Act in the Uniform Code of Military Justice (Govt.'s brief, p. 18, footnote 10). But that discussion far from supports the statement made by the Government although, concededly, Mr. Felix Larkin, Assistant General Counsel of the Office of Secretary of Defense on one occasion seems to support it (at page 1046 of those hearings). For example, Chairman Overton Brooks of the Subcommittee, after the proposed Suspension Act was explained by Mr. Larkin (at page 1044), states:

> "Mr. Brooks: Do you think that time limit of three years is sufficient? We are dealing with fraud here, and, of course, I do not know when the war will be formally over, but it is conceivable that we might be engaged in a conflict that will be over the day the last shot is fired. *Is three years long enough to run down fraud, especially when you have these contracts involved?* (Emphasis supplied.)
>
> Mr. Larkin: Well, we do not care to extend it further than the Federal court jurisdiction at present has provided by this section. I think our experience has been, although it can always change, as you indicate, that the official termination of the war is usually not declared until a considerable period after the cessation of actual hostilities and we provide for three years after that, so I should say that is adequate."

Thereafter, Congressman Elston, after claiming that the Government is being placed at a disadvantage in not pre-

venting the limitations from running except when the fraud is discovered as normally exists in State civil suits, stated apropos of the Suspension Act, at page 1046 of the hearings:

> "* * * whereas the fraud perpetrated against the United States could not be prosecuted regardless of how serious it was *unless it was discovered within three years after the termination of the war.*" (Emphasis supplied.)

Both Congressmen thus interpreted the Suspension Statute as the Circuit Court did below and not as contended by the Government. However, it is submitted, these statements are not any more indicative of the legislative intention than is the statement of Congressman Gwynne referred to by the Government (Brief, p. 16).

This Court, in *U. S.* v. *Smith*, *supra*, at page 229, stated:

> "Since under our construction the three years period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformity" (*sic*).

Such a statement, we believe, agrees with the full intention of the Congress. It is earnestly believed that the statement of Mr. Justice Clark in his concurring opinion, at page 230, that the pressing problems of demobilization that are likely to cause a perpetration of frauds upon the Government were for the most part brought to an end at or before the termination of hostilities is a sufficient indication that the Justice Department did not require six years after termination of hostilities to prosecute offenses involving problems of contract termination and surplus property disposal, and that originally, Congress did not intend to give what the Department of Justice did not need.

The decision of the Circuit Court below is a sound application of the fundamental rules governing the interpretation of statutes of limitation, completely consistent with Congressional intention, as first manifested in the Act of 1942. Its construction of the Statute leads to a just and reasonable result. Its decision should be upheld by this Court.

Its reasoning was recently followed in *U. S.* v. *Witherspoon*, 110 F. S. 364, U. S. D. C., E. D. Tenn. February 2, 1953, and also in *U. S.* v. *Clavere et al.* (2 cases), U. S. D. C., N. D. Calif., opinion not officially reported, cert. granted by this Court and case now pending on the docket, Nos. 635, 636.

See, also, *U. S.* v. *Beacon Brass Co.*, 344 U. S. 43, where in an indictment filed on March 16, 1951 charging the substantive crime of income tax evasion under Section 145b of the Internal Revenue Code by making false and fraudulent statements to the Treasury Department on October 24, 1945, Mr. Justice Minton, speaking for this Court, stated at page 45:

> "Obviously, at the times of the indictments here, the three-year limitation period, 18 U. S. C. (Supp. V) Sec. 3282, for violations of this Statute had expired as to statements made in October 1945."

The three year statute would not have expired under the contention made by the Government as to the operation and scope of the Suspension Act.

B. *The Suspension Act is not applicable to the offense charged in this indictment.*

The arguments made under paragraphs B and C of this brief were not raised below. The failure so to do does not, however, it is submitted, preclude the respondent's right to urge these grounds at this time. *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 134, Note 3; *LeTulle* v. *Scofield*, 308 U. S. 415, 421; and *Langnes* v. *Green*, 282 U. S. 531, 538-539. Indeed, the Government impliedly recognizes this fact by anticipating the argument in its brief at page 21, footnote 11, at least as to paragraph B herein. We respectfully submit that these additional grounds have sufficient merit to sustain the judgment of the Court below in its dismissal of this indictment.

The judgment of conviction in this case recites that the respondents were convicted " * * * of conspiring to defraud the United States of a Governmental function in connection with the rationing of sugar and of the honest and faithful services of employees of the Office of Price Administration" (R. 9-10). This in substance is the indictment (R. 2-8). It is our contention that this crime was never intended by the Congress to be within the scope of the Suspension Act because that Act does not apply to any crime unless a pecuniary fraud is an essential ingredient under the Statute defining the offense.

As we have seen in paragraph A of this brief, the 1942 Suspension Act, as amended in 1944, was derived from the Act of November 17, 1921. The language in both Acts as to the nature of the offenses included is substantially identical.

From the Congressional hearings pending the passage of the 1921 Act, it is clear that the need for the legislation was to enable the Government to get at war frauds, and that the war frauds which concerned the Congress were

those where war contractors had made fraudulent contracts with the Government and the Government had lost, as one Congressman said, " * * * millions of dollars" (Congressional Debates on H. R. 8298, the 1921 Act, 67th Congress, 1st Sess., 61 Congressional Record, 7060-7061, 7064, 69 Congressional Record 842 as to repeal of the 1921 Act).

Similarly, in the House Report on the 1921 Act (H. R. 365, 67th Congress), which was adopted and re-quoted in the House Report 2051, 77th Congress, 2d Session, dealing with the proposed 1942 Suspension Act, it was said:

> "Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds."

The House Report on the 1942 Act (H. R. 2051, *supra*) not only embodied House Report 365, *supra*, but also stated:

> "The purpose of the proposed legislation is to suspend any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, *and frauds against all of these agencies are intended to be embraced by the bill.*" (Emphasis supplied.)

The Senate Report No. 1544, 77th Congress, 2d Session, adopted the full report of the House. Therefore, both under the 1921 Act and the Suspension Acts of 1942, as amended in 1944, Congress intended to reach actual out of

pocket frauds which might have been missed as a result of the country's preoccupation with the war effort. It was this type of crime which Congress was primarily interested in, and as stated by the House and Senate reports to the Suspension Act of 1942, were " * * * intended to be embraced by the bill" (H. R. 2051, S. R. 1544).

The term "defrauding" has two accepted meanings. This Court has stated that the usual and primary sense of the word means cheating the Government out of property or money. *U. S.* v. *Cohen*, 270 U. S. 339, 346-347. Under Section 37 of the Criminal Code, it is unlawful for two or more persons to "conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose." The word "defrauding" has been held to have a secondary meaning of interfering with or obstructing lawful Governmental functions by dishonest means. *Haas* v. *Henkel*, 216 U. S. 462, 479-480; *U. S.* v. *Keitel*, 211 U. S. 370, 393. The Suspension Act does not refer to "defrauding or attempts to defraud in any manner or for any purpose * * *," as provided in Section 37 of the Criminal Code, but rather to "defrauding or attempts to defraud * * * whether by conspiracy or not, and in any manner, * * *." The Suspension Act, thus, omits the defrauding "for any purpose," as provided in Section 37. Its language is thus much narrower than that in Section 37 of the Criminal Code under which this indictment was laid. The legislative history of the Suspension Act supports the conclusion that it intended to cover types of frauds defined in their usual and primary sense. It was the pecuniary and financial loss resulting from such frauds that Congress was concerned with.

The Government maintains in its brief (at p. 21, footnote 11) that had the Court below passed upon this ques-

tion, "it would have held this crime to be an offense covered by the Suspension Act, * * *" in view of its previous decisions in *Miller* v. *U. S.*, 24 F. 2 353, cert. den. 276 U. S. 638 and *Falter* v. *U. S.*, 23 F. 2 420, cert. den. 277 U. S. 590, interpreting the six year limitation proviso in the 1921 Act; and its decision in *U. S.* v. *Gottfried*, 165 F. 2 360, cert. den. 333 U. S. 860, interpreting the scope of the 1942 Suspension Act.

I cannot agree with the Government in this regard, although I recognize that under these decisions, particularly in *Miller* v. *U. S.*, *supra*, at page 360, the Government may find some comfort in its position.

It is true that the *Miller* and *Falter* cases presented conspiracies to defraud wherein the objects of the conspiracies resulted in pecuniary or property losses to the Government. In the *Miller* case, the conspiracy contemplated the determination and disposition of claims under the Trading with the Enemy Act by the Alien Property Custodian and the Attorney General. *Miller* v. *U. S.*, *supra*, page 354. In the *Falter* case, the conspiracy contemplated the acquisition by defendant through fraudulent means of "* * * large amounts of textiles at prices lower than the Branch (Textile Branch of Property Division of War Department) would have sold them but for the fraud" (*Falter* v. *U. S.*, *supra*, at p. 422; parentheses supplied).

Yet, I believe most respectfully that the rationale of the decisions stemmed from an erroneous conception of the scope of the 1921 Act which the 2d Circuit Court would not follow today. The *Falter* and *Miller* cases construe the 1921 Act as co-extensive in scope with Section 37 of the Criminal Code dealing with conspiracies to defraud. The Second Circuit in the *Gottfried* case did likewise (*U. S.* v. *Gottfried*, *supra*, at p. 368, footnote 21, citing *Haas* v. *Henkel*, 216 U. S. 462, 479). In the *Miller* case,

the Court referred to Section 37 of the Criminal Code, wherein it said, the word "defraud" was coupled with the phrase "in any manner" and that the proviso of the 1921 Act made "* * * clear its comprehensiveness in emphasizing and enlarging by the phrase, 'whether by conspiracy or not,' and by the further words 'now indictable under any existing statute,'" (*U. S.* v. *Miller, supra,* p. 360), so as to embrace all conspiracies to "defraud" under Section 37.

Such reason, however, slights the Congressional intention as to the types of frauds contemplated by the 1921 and 1942 Acts which, as we have seen, were solely directed to money and property claims. Furthermore, the rationale is squarely at odds with this Court's holding in *U. S.* v. *McElvain,* 272 U. S. 633 where it was flatly stated, at page 639:

> "The purpose of the added proviso was to carve out a special class of cases. It is to be construed strictly and held to apply only to cases shown to be clearly within its purpose. Cases cited."
>
> "The proviso relates to substantive offenses involving defrauding or attempts to defraud the United States whether committed by one or more or conspiracy or otherwise. * * * *The language of the proviso cannot reasonably be laid to include all conspiracies as defined by Section 37. But if the proviso could be construed to include any conspiracies, obviously it would be limited to those to commit the substantive offenses which it covers.*" (Emphasis supplied.)

The conspiracy in the *McElvain* case was a conspiracy to "defraud" under § 37 of the Criminal Code, like the present indictment. The Government argued there, as it does here, that "defrauding the U. S. is an ingredient of

the crime charged, and that the six year period applies" (*U. S.* v. *McElvain, supra,* p. 638). This argument was rejected. As indicated by the quote above, this Court interpreted the 1921 Act to apply to conspiracies to commit substantive offenses involving defrauding or attempts to defraud the United States under § 37, but not as claimed by the Government to conspiracies to defraud under § 37. This Court similarly rejected the Government's argument in *U. S.* v. *Scharton,* 285 U. S. 518, where the Government claimed that any attempt to obstruct or defeat the lawful functions of any department of Government by dishonest methods, identical with the conspiracy charged here, constituted a "defrauding" within the meaning of the 1921 Act. (*U. S.* v. *Scharton, supra,* at pp. 520-521).

The 1921 Act, as did the 1942 Suspension Act, as amended in 1944, omitted from these statutes, as has been previously pointed out, the words "for any purpose" contained in Section 37 of the Criminal Code. If Congress had intended to include all conspiracies to defraud under Section 37, and not solely pecuniary and property war frauds which we maintain, it would have been simple to provide a "defrauding" "in any manner or for any purpose" as was provided in Section 37. Its omission to do so confirms the specific intention of Congress to limit the proviso in the 1921 Act and the later Suspension Acts to war frauds where the Government was cheated out of money and property. This was the conclusion reached by this Court in the *McElvain* case in its construction placed upon the 1921 Act.

In *Marzani* v. *U. S.,* 168 F. 2 133, U. S. App. D. C. affirmed by a divided court in 335 U. S. 895 (cited with approval in *U. S.* v. *Obermeier,* 186 F. 2 243, 257, footnote 64, 2d Cir.), it was held that the Suspension Act of

1942, as amended in 1944, did not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient. It would follow without question that a conspiracy to commit a substantive offense would be construed in the same manner. If there be a conspiracy to commit an offense of which a pecuniary or property fraud is not an essential element, the Suspension Act would not apply.

It is well settled that a conspiracy to defraud in the secondary sense, *i.e.*, by interfering with or obstructing the lawful operations of an agency of the Government such as charged here will lie under Section 37 of the Criminal Code even though pecuniary or property loss to the Government is not contemplated and does not result. *U. S.* v. *Gilliland*, 312 U. S. 86; *Hammerschmidt* v. *U. S.*, 265 U. S. 182; *Haas* v. *Henkel*, 216 U. S. 462. Thus a pecuniary or property fraud is not an essential ingredient of a conspiracy to defraud under § 37.

To hold, therefore, that the Suspension Act does not apply to a conspiracy to commit offenses, where a pecuniary fraud is not an essential element, but does apply to any conspiracy to defraud, where pecuniary fraud is not an essential element, would create an anomalous situation never intended by Congress. Such a construction would lead to absurd results.

There are few situations where the Government could not bypass a conspiracy to commit an offense and lay the same crime as a conspiracy to defraud in order to bring the crime within the Suspension Act. See, *e.g.*, *Bridges* v. *U. S.*, 199 F. 2 811, 9th Cir., pending before this Court, No. 548; Cf. *U. S.* v. *Ausmeier*, 152 F. 2 349, 356, 2d Cir. Such a construction would place in the hands of the Government a procedural gimmick which would enable it to sweep under the broad conspiracy to defraud concept of

Section 37 of the Criminal Code any conspiracy to commit substantive crimes, *already outlawed*, where pecuniary fraud is not an essential element of the substantive offense. Cf. *In re Doyle*, 42 F. 2 686, S. D. N. Y., rev'd on other matters *U. S.* v. *Doyle*, 47 F. 2 1086.

The indictment does little else but to charge a conspiracy to commit substantive violations of the Sugar Rationing laws and the Maximum Price Regulations under the Emergency Price Control Act. Many of these offenses were outlawed long before the present indictment. They are types of offenses completely different from the war frauds intended by Congress. Yet they are swept together in a conspiracy to defraud charge which can revive them under the Suspension Act, if the Government's position is maintained.

It is for these reasons that we do not think the Court below would have followed these cases referred to by the Government. The Court below discredited, if not overruled, its decision in the *Gottfried* case in *U. S.* v. *Obermeier*, 186 F. 2 243, 2d Cir. Its decision below in the instant case is further proof of the fact that it would not accept a forced construction of the Suspension Act, as maintained by the Government which is clearly at odds with Congressional intention.

It is most respectfully submitted, therefore, that the Suspension Act of 1942, as amended in 1944, was inapplicable to the crime charged in this indictment and that the three year Statute of Limitations applied to bar the indictment.

C. *The Suspension Act was expressly repealed by the Act of June 25, 1948 and was not preserved by either the savings clause in Section 21 of that Act, or the general savings clause, Section 109, Title 1, U. S. C., so as to apply to the indictment in this case.*

The Act of June 25, 1948, c. 645, Section 21, 62 Stat. 802, eff. September 1, 1948, which revised the Criminal Code, repealed the Suspension Act, and with minor changes in language, reenacted it to make this Section permanent instead of temporary legislation. (See *Reviser's Note* following 18 U. S. C., Sec. 3287; *U. S.* v. *Smith*, 342 U. S. 225, 226, footnote 1.) In its permanent form, Sec. 3287 of Title 18 prefaces the Statute with the words, "when the United States is at war." This Act took effect September 1, 1948, so that at the time of this indictment on March 31, 1950, the Suspension Act of 1942, as amended in 1944, had been repealed by some eighteen months.

The examination that has been made of the legislative history of the Suspension Act would seem to indicate clearly that the Suspension Act was primarily directed to the period during actual hostilities of World War II, and not thereafter during the technical state of war that followed until the signing of a treaty of peace. (See also *U. S.* v. *Smith*, *supra*, at pages 228-229.) It cannot be contended that the new Sec. 3287 of Title 18 applies to the present indictment some three years after the shooting war stopped and approximately nineteen months after the termination of hostilities. The Government makes no such claim in its brief, but merely assumes, as did the Court below, that the Suspension Act, as amended in 1944, applies (Govt.'s brief, pp. 7, 9). The Reviser's Note as hereinafter quoted clearly indicates that Sec. 3287 was intended to apply to any future war in which the United States might be involved:

"The phrase 'when the United States is at war' was inserted at the beginning of this Section to make it permanent instead of temporary legislation, and to obviate the necessity of reenacting such legislation in the future" (Reviser's Note to Sec. 3287).

But, unless the Suspension Act claimed to be applicable here was preserved by some effective saving provision, it cannot be resurrected to apply to this indictment. Such a repeal without more has been held to constitute a legislative pardon or amnesty as to all past offenses. *U. S.* v. *Chambers,* 291 U. S. 217, 223; *Yeaton* v. *U. S.,* 5 Cranch 281, 283; *Maryland* v. *B. & O. R. Co.,* 3 How. 534; *U. S.* v. *Obermeier,* 186 F. 2 243, 251, 2d Cir., cert. den. 340 U. S. 951.

The applicability of the Suspension Act to this indictment, therefore, depends upon the meaning of the savings clause contained in Sec. 21 of the repealing act (found at p. 275, Secs. 1-370, Title 18, U. S. C.) or upon the general savings clause in effect at the time of the repeal of the Suspension Act (found in Sec. 109, Title 1, U. S. C., formerly R. S. Sec. 13). Sec. 21 provides as follows:

"The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

Sec. 109 provides as follows:

"Repeal of statutes as affecting existing liabilities. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing

> Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

It is our contention that the tolling of the Statute of Limitations under the Suspension Act did not constitute a "right" of the Government or a "penalty," "forfeiture" or "liability" of the respondents within the meaning of the savings clauses of either Sec. 21 of the 1948 Act or Sec. 109 of Title 1, U. S. C.

In *U. S.* v. *Obermeier*, 186 F. 2 243, 2d Cir., that Court considered the effect of both statutory provisions upon existing statutes of limitation. After an exhaustive and extremely able analysis of the legislative history of Sec. 109, Title 1, U. S. C., and previous adjudications, that Court, in the opinion of Judge Jerome Frank, concluded that neither the savings clause contained in Sec. 21 of the 1948 Act nor the general savings clause contained in Sec. 109, Title 1, U. S. C., preserved the repealed Statute, namely Sec. 746(g), Title 8, U. S. C. (five year limitation for naturalization offenses) because such savings clauses related only to "substantive rights" and "liabilities," but not to the preservation of remedies provided by a statute of limitation. As the Court stated, at page 254:

> "Since 1 U. S. C. A., Section 109, formerly R. S. Section 13, saves merely substantive 'rights' and 'liabilities,' we think it does not save limitation statutes as to past offenses. For usually, a statute of limitations is considered no part of a 'right' or 'liability,' but has affected the 'remedy' only.",

and further at page 255:

> "We think, however, that, for the reasons we have canvassed, the context of 1 U. S. C. A., Section 109, and

> Section 21 of the 1948 Act shows that they were not intended to include, any 'rights' or 'liabilities' of statutes of limitation."

The reasoning in the *Obermeier* case is equally applicable to the Suspension Act. Certainly, as the Second Circuit put it in the *Obermeier* case, *supra*, at page 255, had Congress had a contrary intention, "it would have been so easy to have said so. Cases therein cited."

This Court's recent opinion in *De La Rama S.S. Co.* v. *U. S.*, 344 U. S. 386, it is submitted, is not a contrary authority for the proposition asserted here. In that case, the Court was concerned not with a statute of limitations, but with the effect of the repeal of a statute upon an existing civil action pending in the District Court of the United States. This Court considered the loss of dollars and cents to the petitioner if his cause of action was transferred to the Court of Claims. It felt that the "liability" of the Government and the "right" of the petitioner to recover what the Government admitted it owed would be materially reduced in dollars and cents, if the jurisdiction in which the action was brought was transferred from the District Court to the Court of Claims. The Court thus construed the general savings clause in Sec. 109, Title 1, U. S. C., liberally in favor of the petitioner to permit his action to remain where it was in order to avoid a gross miscarriage of justice.

However, in the instant case we are dealing with the preservation of a statute of limitations pertaining to criminal offenses. The repeal of the Suspension Act long antedated the filing of the indictment. The *De La Rama* case (*supra*) is thus inapplicable. In *U. S.* v. *Smith*, *supra*, at page 261, footnote 1, this Court expressly left open the question of the effect of the repeal of the Suspension Act on the running of a statute of limitations.

It is respectfully submitted that the repeal of the Suspension Act was not preserved by either the savings clause contained in the 1948 Act or by the general savings clause contained in Section 109, Title 1, U. S. C.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

LOUIS BENDER
Attorney for Respondents

U. S. 370.]

No. 527. UNITED STATES *v.* KLINGER ET AL. Certiorari, 345 U. S. 921, to the United States Court of Appeals for the Second Circuit. Argued May 5, 1953. Decided June 15, 1953. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Beatrice Rosenberg* argued the cause for the United States. With her on the brief were *Acting Solicitor General Stern* and *Carl H. Imlay*. *Louis Bender*, acting under appointment by the Court, argued the cause and filed a brief for respondents. Reported below: 199 F. 2d 645.